S. HRG. 100-372

COASTAL ZONE MANAGEMENT CONSISTENCY PROVISIONS

HEARING

BEFORE THE

NATIONAL OCEAN POLICY STUDY

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 1412

TO AMEND THE COASTAL ZONE MANAGEMENT ACT OF 1972 REGARDING ACTIVITIES SIGNIFICANTLY AFFECTING THE COASTAL ZONE

SEPTEMBER 29, 1987

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE
79-324 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S261-22.

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ERNEST F. HOLLINGS, South Carolina, *Chairman*

DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
DONALD W. RIEGLE, JR., Michigan
J. JAMES EXON, Nebraska
ALBERT GORE, JR., Tennessee
JOHN D. ROCKEFELLER IV, West Virginia
LLOYD BENTSEN, Texas
JOHN F. KERRY, Massachusetts
JOHN B. BREAUX, Louisiana
BROCK ADAMS, Washington

JOHN C. DANFORTH, Missouri
BOB PACKWOOD, Oregon
NANCY LANDON KASSEBAUM, Kansas
LARRY PRESSLER, South Dakota
TED STEVENS, Alaska
ROBERT W. KASTEN, JR., Wisconsin
PAUL S. TRIBLE, JR., Virginia
PETE WILSON, California
JOHN MCCAIN, Arizona

RALPH B. EVERETT, *Chief Counsel and Staff Director*
W. ALLEN MOORE, *Minority Chief of Staff*

NATIONAL OCEAN POLICY STUDY

ERNEST F. HOLLINGS, South Carolina, *Chairman*
JOHN F. KERRY, Massachusetts, *Vice Chairman*

DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
ALBERT GORE, JR., Tennessee
LLOYD BENTSEN, Texas
JOHN B. BREAUX, Louisiana
BROCK ADAMS, Washington

JOHN C. DANFORTH, Missouri
TED STEVENS, Alaska
BOB PACKWOOD, Oregon
ROBERT W. KASTEN, JR., Wisconsin
PAUL S. TRIBLE, JR., Virginia
PETE WILSON, California
LARRY PRESSLER, South Dakota

EX OFFICIO MEMBERS

APPROPRIATIONS

JOHN C. STENNIS, Mississippi
MARK O. HATFIELD, Oregon

ARMED SERVICES

SAM NUNN, Georgia
JOHN W. WARNER, Virginia

ENERGY AND NATURAL RESOURCES

J. BENNETT JOHNSTON, Louisiana
JAMES A. McCLURE, Idaho

ENVIRONMENT AND PUBLIC WORKS

QUENTIN N. BURDICK, North Dakota
JOHN H. CHAFEE, Rhode Island

FOREIGN RELATIONS

CLAIBORNE PELL, Rhode Island
JESSE HELMS, North Carolina

GOVERNMENTAL AFFAIRS

JOHN H. GLENN, JR., Ohio
WILLIAM V. ROTH, JR., Delaware

LABOR AND HUMAN RESOURCES

EDWARD M. KENNEDY, Massachusetts
LOWELL P. WEICKER, JR., Connecticut

AT LARGE MEMBERS

SPARK M. MATSUNAGA, Hawaii
GEORGE J. MITCHELL, Maine
FRANK R. LAUTENBERG, New Jersey

WILLIAM S. COHEN, Maine
THAD COCHRAN, Mississippi
DANIEL J. EVANS, Washington

CONTENTS

Page
Opening statement by Senator Kerry ... 1
Opening statement by Senator Stevens ... 3
Opening statement by Senator Wilson ... 4
Text of S. 1412 ... 6

LIST OF WITNESSES

Bettenberg, William D., Director, Minerals Management Service, Department of the Interior ... 25
  Prepared statement ... 27
Chasis, Sarah, senior attorney, Natural Resources Defense Council; and Robert W. Knecht, University of California, Santa Barbara ... 95
  Prepared statement ... 98
Delaney, Richard F., chairman, Coastal States Organization; accompanied by Peter Douglas, executive director, California Coastal Commission; and Stephen Snyder, director of planning and certification, South Carolina Coastal Council ... 77
  Prepared statement ... 81
Ghylin, Clair, manager of land, western region, exploration and production, Chevron Corp; accompanied by E. Edward Bruce, counsel; and Paul L. Kelly, vice president, Rowan Companies, Inc ... 48
  Prepared statements:
    Mr. Ghylin ... 50
    Mr. Bruce ... 55
    Mr. Kelly ... 62
    Letter of October 21, 1987 ... 67
Hookano, Thomas, Deputy Assistant Attorney General, Department of Justice ... 19
  Prepared statement ... 21
Panetta, Hon. Leon, U.S. Representative from California ... 7
  Prepared statement ... 14
Tweedt, Peter, Director, Office of Ocean and Coastal Resource Management, NOAA; accompanied by J. R. Spradley, Deputy General Counsel ... 16
  Prepared statement ... 17

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Cowper, Hon. Steve, Governor, State of Alaska, letter ... 107
Vicchiolla, Albert A., Assistant General Counsel, Disposal Division, GSA, letter ... 37

COASTAL ZONE MANAGEMENT CONSISTENCY PROVISIONS

TUESDAY, SEPTEMBER 29, 1987

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
NATIONAL OCEAN POLICY STUDY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SR-253, Russell Senate Office Building, Hon. John F. Kerry, (vice chairman of the study), presiding.

Staff members assigned to this hearing: Mike Nussman, professional staff member; and Bob Eisenbud, minority professional staff member.

OPENING STATEMENT OF SENATOR KERRY

Senator KERRY. This hearing will come to order.

I would like to welcome our witnesses and guests alike to this hearing on S. 1412.

This legislation is designed to amend the consistency provisions of the Coastal Zone Management Act. The purpose of the bill introduced by Chairman Hollings and cosponsored by myself and others is to try to make clear congressional intent on an issue which is of great concern to coastal States in the country and an issue which is increasingly controversial today.

The specific question that we intend to clarify in this legislation relates to the ongoing debate over whether or not Congress intended for the outer continental shelf oil and gas lease sales, which have been proposed by the Interior Department, to be subject to review by the coastal States affected. The question is, what did Congress intend when they included under the Coastal Zone Management Act a provision that requires that all Federal activities affecting a State's coastal zone be carried out in a manner that is consistent with the provisions of the State's coastal management plans.

It is my opinion, and the opinion of the sponsors of the bill, that Congress did clearly intend for Federal and State governments to act cooperatively and jointly in managing our Nation's coastal zones.

Nonetheless, as all who have been active in this area know, the 1984 Supreme Court decision of *Interior* v. *California* has confused the issue and perhaps even muddled the consistency interpretation which was intended in the Coastal Zone Management Act. The Supreme Court's 5 to 4 decision ruled that the Interior Department's sale of OCS oil and gas leases is not an activity which was "directly affecting a State's coastal zone" and, therefore, was not subject to being consistent with the provisions included in the Coastal Zone Management Plan.

I think—and others share the view—that this interpretation raises very significant questions. First of all, the Supreme Court decision focused attention solely on activities within a State's 3 mile coastal zone. It ignored the effect of activities outside of the zone, which could affect the coastal zone itself.

We are left asking to what extent does off-shore oil and gas leasing actually affect activities within a State's coastal zone. Again, it is my opinion—and we will put that to test today with various witnesses—that there is a strong correlation between activity outside of the zone and its impact on activity within a State's coastal zone.

In my own State of Massachusetts, for example, the proposed lease sale 96 is expected to take place on the most sensitive spawning ground for New England's fish on the Georges Bank. New England and my State and other States have enormous economic ties to the Georges Banks, a $2 billion fishing industry which insures 40,000 jobs, not to mention its connection with tourism and other industries.

Considering that Georges Bank is one of the most productive offshore treasures in the world, common sense would seem to say that any activity on Georges Bank related to off-shore oil and gas drilling is an activity that does have a significant environmental and economic impact on Massachusetts' coastal zone. It seems also to flow from that same thinking that activity ought to be coordinated with the State's coastal zone plan.

The purpose of this legislation is straightforward. It is to insure that the Federal leasing policy does not violate a State's coastal zone plan.

Two questions which I think are important to ask, are first, what are the benefits of drilling on Georges Bank compared to potential damage and second, what are the benefits of chilling when compared with the overall coastal zone management plan of a particular State?

Another concern of mine stems from Interior's actual 5-year plan. I think it is hard for some of us to feel sanguine about an agency's approach to our shores when they are so clearly riding the edge, if you will, of current law with respect to that plan. Secretary Hodel's plan, which I might add is strongly opposed by the Environmental Protection Agency and questioned by administrators at the National Oceanic and Atmospheric Administration, includes areas off Georges Bank that Congress has consistently placed a moratorium on with regard to any oil and gas activity. In looking at the charts, it is clear that Interior's plan includes areas which come under that moratorium.

Since the Supreme Court decision 3 years ago, the Department of Interior is the agency that has had sole responsibility over oil and gas leasing decisions. And I think it is, therefore, not surprising that some of us are nervous about the fact that the coastal zone management plan is somehow left out of this agency's oversight, while at the same time, this agency has been willing to stomp on the concept of the moratorium.

It seems to me that if we keep all of this in mind, it is imperative that federally promoted activities affecting our shores should not be permitted to go forward without some review—some State review, I should add. The efforts by the Interior Department to go ahead with off-shore drilling and gas leasing on the outer continental shelf without State input stands in stark contrast to this administration's constant efforts to promote the so-called federalism and States' rights which they have talked about for so long.

Interior's OCS off-shore oil and gas leasing policy is clearly an example of the Federal Government bypassing the States in order to institute a policy that may squander the Nation's natural resources for presumed short-term goals. And it is precisely the balancing of those equities and those interests that we will be examining in the course of today's hearing.

Before turning to our first witness, Congressman Panetta, let me ask if my colleague, Senator Stevens, has any opening comments he would like to make at this time.

OPENING STATEMENT BY SENATOR STEVENS

Senator STEVENS. Thank you, Mr. Chairman. I am sorry to be a little late, and I'll be brief.

I have expressed my position before concerning legislation on this subject. I do not agree that consistency certification for lease sales is necessary. I think that we have to have some action, however, to try to resolve the uncertainty that exists in Federal waters.

We are reviewing today legislation which would dramatically expand the scope of the federal consistency provisions of the Coastal Zone Management Act. All will agree that there are problems with the implementation of the CZMA. Alaska is having difficulty in implementing a number of coastal management plans drafted and submitted by local governments. I do believe, however, that S. 1412 as drafted will resolve the tensions inherent in the balancing of national and local interests.

The stated purpose of S. 1412 is to expand the scope of federal consistency to include the sale of Outer Continental Shelf oil and gas leases, even though section 307(c)(3) of the CZMA already requires that any exploration, development, or production be consistent with a state's approved management plan. Though I do not agree that a consistency certification for lease sales is necessary, even more troublesome is the uncertainty which will be created for other activities in the federal waters.

The Department of Justice will testify today that virtually every activity in federal waters could be required to be fully consistent with state programs, whether or not such activity has any significant impact on the environment. The Department further states that S. 1412 will likely result in more litigation and less certainty than is present under the status quo. If the Department's analysis is correct, the proposed changes in the standard for a federal consistency determination will serve only to create more confusion for the regulatory scheme.

The solution, in my opinion, is not a change in the substantive standards for consistency. It may be that the process for implementing and reviewing federal consistency can be streamlined to reduce frustration and uncertainty. I am hopeful that this hearing will provide the Committee with a substantive record which we can use in efforts to resolve problems with this and other aspects of the Coastal Zone Management Act.

I do look forward to working with you to see if we can deal with this overall question of uncertainty.

Thank you very much.

Senator KERRY. Thank you very much, Senator Stevens.

Senator Wilson.

OPENING STATEMENT BY SENATOR WILSON

Senator WILSON. Thank you, Mr. Chairman.

My interest and support for this bill relates to the specific issue considered by the Supreme Court in its 1984 decision that stripped the California Coastal Commission of its authority to review Federal outer continental shelf lease sales. In that decision the court determined that an OCS lease sale is nothing more than a paper transaction that in itself does not affect a coastal zone.

Well, I simply cannot accept or agree with that kind of an analysis. To the contrary, an OCS lease sale is a critical stage in the development of the off-shore waters in denying coastal States any kind of meaningful input into a lease sale decision. It seems to me to contravene the very essence of the State-Federal partnership envisioned by the Coastal Zone Management Act.

It is at the lease sale stage that many crucial decisions are made about how potential oil and gas resources will be developed. Conditions of the lease relate to what areas can be bid upon, general mitigation requirements, operating conditions, contingency requirements, safety requirements and a whole host of other considerations.

The irony of this is that many of these lease sale conditions are designed solely to address potential impacts on coastal resources. And yet, under existing law coastal States are now without authority to exercise their consistency review in helping to shape these lease sale conditions.

The 1984 Supreme Court decision offers little consolation to coastal States by reminding them that the Court's decision does not affect a State's right to exercise its consistency authority at that point when an oil company applies for an exploration or development permit at a particular OCS site. This is little consolation because by the time an oil company—the time that the company comes in for a development permit—many of the important decisions about how a particular tract will be developed have already been made at the lease sale stage.

If a coastal State were to use its consistency authority at the development stage to try to work major changes in the way in which a tract will be developed, the oil industry applicant is likely to incur substantial cost in accommodating such changes. It would be far preferable, both from the standpoint of the State exercising consistency review and from the standpoint of the oil company facing potential heavy costs to change its plan, to have this occur at the lease sale stage where crucial development decisions are clearly affected rather than waiting until a particular oil applicant has spent literally tens of millions of dollars before the affected coastal State has its first opportunity to weigh in with its views.

The Chairman's bill, a bill which I have enthusiastically cosponsored, would solve this problem by making clear that coastal States will have the authority to exercise their consistency review authority at the OCS lease sale stage. I hope that we will be able to act promptly on this important legislation.

And Mr. Chairman, I say with some pride that my colleague from California at the witness table has demonstrated very great leadership. He has I think fought the good fight, often with less resources at his command to do so than I would have hoped. But, nonetheless, he has made a valiant stand and an effective one repeatedly. So, I am particularly pleased to welcome him here to the committee. I apologize to him for taking this time, but I feel strongly about this issue as he does.

Thank you.

[The bill follows:]

II

100TH CONGRESS
1ST SESSION

S. 1412

To amend the Coastal Zone Management Act of 1972 regarding activities significantly affecting the coastal zone.

IN THE SENATE OF THE UNITED STATES

JUNE 23, 1987

Mr. HOLLINGS (for himself, Mr. KERRY, Mr. WILSON, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

---

A BILL

To amend the Coastal Zone Management Act of 1972 regarding activities significantly affecting the coastal zone.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 307(c)(1) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1456(c)(1)) is amended to read as follows:

"(c)(1)(A) Each Federal agency conducting or supporting an activity significantly affecting the natural resources or land or water uses in the coastal zone shall conduct or support that activity in a manner which is fully consistent with the enforceable, mandatory policies of approved State management programs, unless the Federal activity is—

"(i) undertaken to counter the immediate effects of a national emergency declared by the President;

"(ii) undertaken by the Secretary of Defense and is necessary for reasons of national security;

"(iii) required by any provision of a Federal law which prevents consistency with any provision of an approved State coastal zone management program; or

"(iv) undertaken pursuant to the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

In the event that achievement by a Federal agency of full consistency is prevented by a circumstance described in clause (i), (ii) or (iii) of this subparagraph, the agency may deviate from full consistency only to the extent justified by the presence of such circumstance.".

Senator **Kerry**. I thank the Senator for his comments, as well as for his support and input on this bill, and also for his assistance in introducing my good friend, Leon Panetta, Congressman from California.

We are delighted to have you here with us. We know you have worked hard on this and have companion legislation in the House, and we would be delighted to hear your comments.

STATEMENT OF HON. LEON PANETTA, U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. **Panetta**. Thank you very much, Mr. Chairman.

I would ask that my statement be made part of the record, and I would like to just summarize it for your purposes.

Senator **Kerry**. Thank you. We will make the full statement part of the record.

Mr. **Panetta**. First of all, my thanks to the committee for giving me the opportunity to testify and a special thanks to Senator Wilson for his kind words and the efforts that we have in common in trying to deal with this issue.

I have similar legislation that I have introduced in the House that would restore to the States the right to review Federal activities which significantly affect the State coastal zone resources.

There are several points I would like to make. The first is that I think what we are interested in doing here is to try to restore the Federal-State relationship which was envisioned by the Coastal Zone Management Act. I think all of us that have dealt with this issue in one way or the other recognize that we are dealing with natural resources. The obligation of how we deal with those natural resources is really a partnership relationship between the Federal and State governments, and I think the obligation on the part of the State and Federal Government is to exercise good stewardship, which is to try to determine what can be developed and also what should be protected.

To implement that partnership, you have got to have a process that implements that relationship between Federal interests and State interests. What happened was that that kind of partnership was built into the Coastal Zone Management Act, but when the Supreme Court ruled that Federal leasing activities would not be subject to the consistency review, that basically destroyed that mechanism, that process, for trying to balance that relationship between the Federal and State governments.

So, that brings us to this legislation which is essentially designed to restore the basic intent behind the Coastal Zone Management Act. There are several key reasons for doing this.

One is that I can't think there is much question, if you look at the history of the Coastal Zone Management Act, that clearly the intent of that act was to provide that Federal activities "directly affecting" the coastal zone would, in fact, be subject to a consistency review. If you look at the background on that legislation, it was in conference that the words "directly affect" were put into the original bill, into section 307(c)(1). It was adopted in a House-Senate conference, and it replaced language in each chamber's bill which only reached Federal activities in the coastal zone. So, it was obvious from the debate in the conference itself that what they were intending to do was to provide consistency review for anything that again "directly affects" the coastal zone rather than just being in it.

The change in the final bill I think was clearly designed to allow States to review Federal activities outside of the coastal zone itself. I think in any common sense approach to this, it is clear that the intent was not just to stop at the 3 mile limit. I mean, obviously if someone is hammering on your house and making a lot of noise, it doesn't make a great deal of difference whether he is standing outside the house or inside the house. The fact is that it has a significant effect in terms of the home itself. And I think that was basically the intent in this legislation. It was to be able to go out to those effects, even if they are outside of the coastal zone, that have an impact within the coastal zone.

The second point I want to make is that oftentimes in opposition to legislation like this there is an argument that somehow this gives the States a veto power. There simply is no veto power provided here to the States. And let's make that clear for the record. A State review of Federal oil and gas lease sales would not give the

States a veto power over such sales. In effect, what it does do, is to give them the opportunity to express their viewpoints. It gives them the opportunity to express their concerns. If the parties submit to mediation with the Secretary of Commerce, they can do that. But ultimately the Federal Government can pretty much have its way. What you are doing here, in effect, is giving the States in the very least an opportunity to express their viewpoint at the beginning of the lease sale process rather than after it.

The third point I want to make is that we are dealing with a double standard here. The Federal Government each year pumps about $36 million to coastal States for purposes of developing coastal management plans. I think there are something like 29 States that have developed those plans for purposes of protecting their coastal zone.

At the same time while we are encouraging States, to the tune of almost $36 million a year to do that, we have at the same time the position of the Interior Department and the Supreme Court that we are not going to pay attention to those coastal zone management plans and the lease sale process. I think we are talking about a double standard here in which we are encouraging States to do one thing, but at the same time saying we are not going to pay attention to it. I think it makes sense to not only encourage the States to implement their coastal zone management plans, but also to pay attention to them once they have done that job.

The last point I want to make is that, again, it seems to me that as Senator Stevens said—and I think that is really at the crux of the problem here—is how we can develop a common sense process that allows these issues to be resolved rather than always winding up in litigation and confrontation and guerrilla warfare, which is essentially the state of affairs at the present time. And unless we provide some kind of process that gives the States and the communities the opportunity to express themselves early on in the lease sale process, they will view every effort, ultimately, down the road, as some kind of threat in the sense that they have not had an opportunity to participate. You almost automatically then have the series of court suits that are brought time and time and time again.

It seems to me it is in the interest of the oil companies early on, prior to the lease sale itself and the investment that an oil company has to make in a lease sale, to find out what the problems are going to be in terms of dealing with that State. And the reality is that at that stage, when you are dealing with the lease sale, it is the Interior Department that can help resolve these problems with the State. It is not each individual oil company having to go to the State to get their particular certification in order to get their permit; rather, it makes sense, on a broader scale, to have the Interior Department working with the States in order to determine whether or not those lease sales are consistent with what the States have developed. So, it seems to me it is in the best interests of the oil companies, as well as the public, as well as the States, as well as the Federal Government, to have a process for determining consistency early on in the lease sale rather than after it is accomplished.

Lastly, in my statement I quoted from Justice Stevens in *Secretary of Interior* v. *California* because I think he really summarized in a quote the benefits of State consistency reviews of OCS lease sales. I think those are the important benefits that this kind of legislation would help everyone with.

So, in closing, Mr. Chairman, I commend you and the other members of the committee for your work with regard to S. 1412. You have taken an important step to try to restore the balance in the development of off-shore lease sales. I think the approach that you've taken will benefit both our coastal States and the companies involved in off-shore oil and gas development, and I look forward to working with you in this effort.

Senator KERRY. Thank you very much, Congressman. I appreciate your testimony. I think it is important for us to hear some of the legislative intent here and some of the background to the original legislation, and obviously, that plays a very important part in our understanding of what Congress intended to do at that time and is central to our deliberations.

Senator Stevens, do you or Senator Wilson have any questions?

Senator STEVENS. Well, I don't know whether it is the time to get into this or not, but my good friend is here—he is my good friend, too. It's not just a phrase. Leon, it is nice to see you here.

I continue to be disturbed about the matter that I went into in depth with my old friend, Bob Knecht, who is here again today, and that is the penchant of States to turn around and delegate authority to local communities.

And I note with very great interest the articles that have appeared in the Los Angeles Times now. Mr. Chairman, I think those ought to go in the record [1] because they demonstrate what I have been talking about now for three years—Coastal Commission, an ideal gone astray. Now 15 years old, the panel has become embroiled in politics, money, back room maneuvering. And what has happened is that by virtue of this concept of consistency, your State and mine to a certain extent has delegated the authority to a commission which again looks to local communities. And we find that the judgments of those communities and the commission are clouded by fund raising activities, by decisions as to whether or not radars are required which the Coast Guard says are not necessary because they happen to be made in a district of one of the commissioners.

I mean, how are we going to get this consistency to the point where it involves some decision on the local level as to consistency with objectives without getting us into the specifics of what the Los Angeles Times points out, politics, money and back room maneuvering? I think there is enough of that on the Federal level.

To subject these plans to that on the State level and then again on the local level results in what happened to our pipeline, which you know. When we tried to reverse the El Paso pipeline and take Alaskan oil from Long Beach to Texas and keep it in the pipeline system, your commission said no. We held hearings out there. We could not get it through. As a result, the people of what we call the

---

[1] The articles referred to appeared in the *Los Angeles Times,* Sept. 7, 1987, and were not reproducible.

South 48 now pay $1.50 to $2 more for oil from Alaska because we are paying a tariff to go through a Panama pipeline, and that oil never reached the Midwest of the United States. It went around the coastline. Had it gone to Texas, it would have gone into the area where they had a great need for it and the refineries of interior America. And that all came about because of this issue.

Now, I think that the Court has given us a chance now to deal with this question and try to eliminate some of this uncertainty, but somehow or another I say we have got to find a way to put this on a workable basis. I would suggest something similar to what we did in the 200-mile limit concept, an organization that exists between the State and the Federal Government that deals with both, takes a little power from each, but has independent authority to settle these questions and is not involved in politics, by law cannot be involved in politics. I suggest that to you. I think we must think anew about this, and consistency to me does not mean turning over to the States or the local governments the powers that we should exercise here in Congress.

So, I hope my friend will understand where some of us are coming from. And I know my other good friend here today from California may not agree with me. But this concept continues to plague us, and it plagues us in a way that has led to more and more of this type of thing that is reflected in the Los Angeles Times article.

And I don't criticize—don't misunderstand me. I think the same thing goes on in my State. It goes on along the east coast, and it goes on along the coastline wherever we have the problems of dealing with all three levels of government in order to proceed with one activity. I would hope that we could work together, but I can't say that I support the proposition before us now.

Mr. **Panetta**. Senator, if I could just comment. If you can develop an organization somewhere between the State government and the Federal Government that is not going to be subject to political influence, I sure would like to see that. It's a tough thing to do. That's the problem.

Senator **Stevens**. We have done it effectively in the 200-mile limit bill. Senator Magnuson and I worked that out in this committee. As a matter of fact, it is still working. It has done very well. It exercises partially Federal powers, partially State powers, but local governments in the State cannot get in its way.

Mr. **Panetta**. No. I understand what you are saying, but obviously any group of commissioners or whatever you want to call them are going to be subject to political pressures from either the oil companies or the other interests that are involved, such as the environmental interests. I mean, there are always going to be those pressures brought on individuals to make these decisions.

Listen, if you can come up with that kind of approach, I would certainly be interested in looking at it.

With regard to the Coastal Commission, I guess my concern there is you don't want to throw the baby out with the bath water. If there are problems with the Coastal Commission, then they ought to be looked at, as NOAA is at the present time looking at the situation there. But when you have 29 States developing coastal management plans and you have a number of people involved in implementing those plans, they are going to be subject to those problems.

But I also want to bring to your attention the fact that the Coastal Commission in California has approved about 95 percent of all of the lease sales and permits that have come before them with regard to off-shore drilling. They haven't exactly inhibited off-shore drilling off California. They have basically been working pretty closely to try to make sure that those efforts proceed in a way that meets their requirements.

I have heard the argument used against the Coastal Commission, but when it comes to the issue of off-shore lease sales, I don't think it sticks. I think the fact is that the Coastal Commission has been very cooperative in terms of off-shore drilling.

Senator **Stevens**. I didn't mention lease sales at all. I am not that concerned about those.

I think those of us who deal with the issue would like to see consistency in the sense of having the ability on a local level, on a State level, to have long-term planning be recognized without getting into the area where every single activity that comes along must go through these permitting processes. That is what happened to our pipeline. We just went through so many permitting processes that finally the City of Long Beach killed it.

Having lived through that, we are not going to do that again. As the Chairman of the committee says, there is no lesson out of the second kick of a mule. Alaskans are not going to try to bring oil through California again. I can assure you of that.

The question is what happens to someone else who has got a problem dealing with another State. It might be my State. It might be Massachusetts. It might be South Carolina. It is going to happen again and again until we get a concept which recognizes long-term planning but does not allow subjective veto of individual decisions within that plan. That's the problem as far as I am concerned.

I appreciate your being here.

Mr. **Panetta**. Thank you.

Senator **Kerry**. Senator Wilson.

Senator **Wilson**. Thank you, Mr. Chairman.

Mr. Chairman, I have found the colloquy here between my colleagues fascinating. And let me just make a point.

I think that it is clear that whatever derelictions may have been revealed in that article in the Los Angeles Times, that the Senator from Alaska referred to, while they warrant the serious attention and some curative, remedial effort, I think that is a set of questions totally apart from what this legislation seeks to address.

And the point made with abundant clarity by our distinguished witness is that to have input too late, after the lease sale stage, rather than earlier when it can save both the oil companies money and have a far greater impact in terms of avoiding what he has rightly termed the guerilla warfare, the endless lawsuits, is precisely I think why the idea of a coastal zone management act was a good idea. I don't think we need an additional level. I am not sure that an additional level would be any more immune unless it is immunized by specific provisions in the law.

I will tell you what is wrong with the performance on the part of individual commissioners. They are permitted to be involved in the political fund raising effort. They should be cut off from it. That is what is wrong.

Let me ask this question of our distinguished witness before he has to leave. He has made I think a very compelling argument that the consistency proceedings that are available to the States under the act, if they are to be meaningful and really achieve their purpose, need to occur early and they also need to address activities that occur outside the coastal zone itself, outside the State waters. I think he is absolutely right.

I am going to ask what will seem almost a rhetorical question, but as an example of the precise kind of thing that he is talking about, I would ask him if he doesn't agree that the situation that we have in California in terms of air quality over the rigs off shore affecting ambient air quality on shore isn't precisely an example of the kind of situation that he has described that dictates input from the State, not a veto, but certainly the kind of input—because what we are seeing is that the air off shore—and to use his phrase having to do with a double standard—we have a double standard in that situation, two different Federal agencies administering two different Federal standards, Interior administering the off-shore air quality with a much less stringent standard so that the quality of that air very quickly, in a matter of hours literally as the prevailing winds blow it on shore, affects and degrades the ambient air ashore.

That is more than simply an aesthetic consideration. It is more than a health consideration. It also extends to affect the economic health of the affected area. If you are trying to open a dry cleaning establishment and go to the local air pollution control district, and you are told you can't gain a permit because the fact is that you will add to a degraded air situation, then it is very relevant what is being blown ashore and what standard is being administered. I think that that is a situation that requires separate legislation to address it. And in fact, it is being addressed under the Clean Air Act Reauthorization.

But it is precisely the point that Congressman Panetta has made I think with great clarity. And I can think of many, many others. But whatever may be wrong with the functioning, in terms of land use decisions by individual commissioners, will be cured by changing the rules under which they operate, not by depriving the State of a voice in consistency proceedings and certainly not diluting that voice by letting it be heard only too late after the time when it could really make a significant difference, in terms of saving oil companies money and in terms of avoiding the necessity for these rear guard legal actions and other things that he has described as guerilla warfare.

Mr. PANETTA. Senator, I think it is obvious that you don't have a wall at the three mile limit, especially in California where both the wind currents, as well as the ocean currents, drive towards the coast. Anything that impacts on air quality is eventually going to wind up on shore. And that is true for oil spills, and it is obviously true in terms of on-shore development. If you are going to have off-shore oil drilling, you have got to have some kind of on-shore development to support that system. And so, you just can't divide the two. You can't just say because it is beyond the 3-mile limit that somehow it doesn't impact.

And it just makes sense early on in the process to evaluate what that impact is going to be and try to get it resolved between Interior and the States. That is their job. Interior may not like it. They may not like to have to deal with the States, but they are going to have to deal with them at some point.

The problem now is we have nine counties, for example, that, because of the frustration over this whole process, have developed their own ordinances that say they are not going to allow any onshore development unless the people in their communities vote for it. Now, it is being challenged by the oil companies, but we probably will have litigation that is likely to go on another nine months to determine that issue.

But the problem is that if the community doesn't get some kind of sense that they are being heard there, they will go someplace else. They will go to the State legislature, and there will be another barrier put up, or they will go to another lawsuit.

If we want to avoid the constant confrontation on this issue, there has got to be a process developed. And it is not going to be easy. Interior always is frustrated by the process, but that is what they get paid to do. What we get paid to do in this job is to try to resolve controversy. And it seems to me that if you at least put this process in place, it makes for a much more common sense approach of trying to deal with these issues rather than just saying to heck with it and ultimately winding up in court and in litigation and in all kinds of amendments that we try to get through to try to impact on this issue in one way or another. It is just not a good way to do business.

Senator **KERRY**. Thank you very much, Congressman. We appreciate your testimony.

Mr. **PANETTA**. Thank you very much. I appreciate it.

[The statement follows:]

STATEMENT OF HON. LEON E. PANETTA, U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. Chairman, thank you for giving me the opportunity to testify before you on your bill, S. 1412.

This important bill, like a similar measure which I have introduced in the House, is designed to restore to the states the right to review federal activities which significantly affect state coastal zone resources for consistency with federally-approved coastal management plans. It is a basic concept, and I commend the Chairman and Senators Wilson, Kerry, Kennedy, Cranston, and Roth for supporting it.

This bill would restore the full federal-state relationship which was envisioned by the drafters of the Coastal Zone Management Act. That statute was intended to provide for a partnership under which states are given the opportunity to review federal activities and federally-permitted activities which affect the coastal zone for consistency with approved state coastal management plans, if the states develop an approved coastal management plan. This simple, but important, relationship balances federal interests with state interests, and helps to ensure that needed projects can go forward if they comply with state coastal protection standards.

The Supreme Court's 5-4 ruling in 1984 that federal oil and gas leasing activities on the Outer Continental Shelf were not subject to consistency review disrupted that balance. It ended the states' ability to review federal oil and gas lease sales, and it raised serious concerns about whether other federal activities might also be found, by later courts, to be exempt from consistency reviews.

The legislation which you, Mr. Chairman, and your colleagues have introduced will ensure that states are not stripped of their power to review federal activities which significantly affect the natural resources or land or water uses in the coastal zone.

Let me make a few other important points with regard to this issue. First, this measure represents an effort merely to restore the original intent of the Coastal Zone Management Act, not an effort to extend that statute beyond its original scope. Section 307(c)(1) of the statute, by its very words, makes it clear that federal activities "directly affecting" the coastal zone are, in fact, subject to consistency review. It makes no reference to the location of those activities; instead, the exercise of state review is dependent upon the effect of the federal activity.

There is other evidence, beyond the plain words of the section, that Congress meant state review to extend to all federal activities with direct effects on the coastal zone, including OCS lease sales. Justice Stevens noted in the dissenting opinion in *Secretary of Interior* v. *California* that the "directly affecting" standard in section 307(c)(1) was adopted in a House-Senate conference on the Coastal Zone Management Act and replaced language in each chamber's bill which only reached federal activities "in" the coastal zone. This change in the final bill was clearly designed to allow states to review federal activities outside the coastal zone itself. Justice Stevens also noted that the conference report indicated that the consistency requirement applied to "Federal agencies involved in any activities directly affecting the state coastal zone." Justice Stevens also cited numerous other occasions, after the enactment of the Coastal Zone Management Act, on which Congress manifested its belief that section 307(c)(1) applied to OCS oil and gas lease sales with direct effects on the coastal zone. Your legislation would restore the original intent of Congress that the effects, rather than the location, of the activity, should determine the applicability of the state consistency review provisions of section 307(c)(1).

A second important point, Mr. Chairman, is that state review of federal oil and gas lease sales would not give states a "veto" power over such sales, as some opponents may claim. Even if a state disagreed with the federal agency's determination, the lease sale would go forward unless the parties agreed to submit to mediation by the Secretary of Commerce or unless the state succeeded in persuading a court to overturn the federal agency's action. (Hopefully, the possibility of litigation would encourage the parties to resolve their differences through negotiation or mediation.) There is simply no state "veto" power over federal activities.

A third key point, Mr. Chairman, is that this legislation has significance beyond OCS oil and gas lease sales. What it involves is the clarification of how we determine whether any federal activity is subject to state consistency review. As I have noted, this legislation specifies that the test, again, is whether the federal activity has a "significant" effect on the coastal zone, not whether the activity is located within the coastal zone. Although I believe that clarification of the power of states to review federal oil and gas lease sales is important enough, taken alone, to justify this measure, we must not forget that many other federal activities, some of which may take place outside the coastal zone, can also cause direct or significant effects on the coastal zone. Unfortunately, several federal agencies have argued that the decision in *Secretary of Interior* v. *California* prohibits state review of other federal activities and federally permitted activities outside the coastal zone. If we do not adopt legislation such as that being considered here today, our states may eventually lose all of their ability to protect their coastal resources from harm caused by federal activities outside the coastal zone. If that happens, we will be very close to having entirely eviscerated the Coastal Zone Management Act.

Mr. Chairman, as I have said, I think that restoration of this important state review power should be sufficient reason for Members to support your bill. But let me point out another benefit of the bill, one which I think should receive greater recognition and discussion. I believe that this legislation would, in fact, be of substantial benefit to the oil and gas industry. The reason for this is simple: allowing states to review federal OCS oil and gas lease sales for consistency would permit companies to evaluate the scope and dimensions of state concerns about potential leasing areas before making substantial investments to obtain leases.

Under the present system, states, quite properly, exercise their power to review federally permitted activities, and they sometimes ask for needed changes in offshore projects to ensure consistency. They do this, however, when the companies apply for consistency certificates, rather than when the federal government conducts the lease sale. This means that the state is considering consistency issues for the very first time when companies apply for their consistency certificates, and it is the companies, rather than the federal government, which must go through that review process.

By restoring to the states their right to review federal oil and gas lease sales for consistency, we would give companies a better and earlier indication of how they might later be asked to conform their projects to state coastal plans at subsequent exploration and development and production consistency reviews. If a lease sale consistency review disclosed that potential project might pose particularly acute risks to coastal resources, a company would then be able to evaluate the costs and benefits of the project, in light of that information, and the company would be able to make a more informed decision about its interest in that project. This would reduce the economic risk for companies involved in OCS oil and gas development. It might also shorten the time needed to review exploration and development and production plans which, again, would benefit companies eagerly awaiting the opportunity to recover their enormous investments in OCS leases.

Justice Stevens eloquently summarized the benefits of state consistency reviews of OCS lease sales. In his dissenting opinion in *Secretary of Interior* v. *California*, he explained that:

"The sale of OCS leases involves the expenditure of millions of dollars. If exploration and development cannot be squared with the requirements of the CZMA, it would be in everyone's interest to determine that as early as possible. On the other hand, if exploration and development of the tracts would be consistent with the state management plan, a pre-leasing consistency determination would provide assurances to prospective purchases and hence enhance the value of the tracts to the Federal Government and, concomitantly, the public. Advance planning can only minimize the risk of either loss or inconsistency that may ultimately confront all interested parties."

These are important benefits which I hope that both Members and companies in the industry will consider.

Senator KERRY. If I could ask the members of the first panel to come forward please. Peter Tweedt, Thomas Hookano, William Bettenberg.

Gentlemen, I am going to ask as you get settled there—we are going to have to begin to get on to a little bit of a timed framework here in order to permit us to get through the panels and their testimony, and also have adequate time for questions. So, I ask you to summarize your statements in approximately 5 minutes, and we will use the time light. The red light will indicate we'd like you to try to wrap it up. And then we will proceed with the questioning period.

Mr. Tweedt, if you could begin and perhaps identify yourself for the record. Thank you.

STATEMENT OF PETER TWEEDT, DIRECTOR, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE, ACCOMPANIED BY J.R. SPRADLEY, DEPUTY GENERAL COUNSEL

Mr. TWEEDT. Thank you, Senator. I would be happy to summarize my testimony.

I am Peter Tweedt, Director of the Office of Ocean and Coastal Resource Management in NOAA in the Department of Commerce.

I appreciate the opportunity to testify on Senator Hollings', Senator Wilson's and your bill on the consistency provisions.

As you know, in 1984 the Supreme Court, in *Secretary of Interior* v. *California* decided that OCS lease sales are not subject to state review under the Federal consistency provisions of the Coastal Zone Management Act. NOAA supports this decision and therefore opposes S. 1412.

Because of the uncertainty in the search for oil and gas, requiring consistency, determination, and review, prior to the preparation of an exploration plan would be simply premature. While requiring general environmental impact statements and descriptions of possible effects for a proposed rule area is appropriate, final consistency determination cannot be made prior to the preparation of an exploration plan.

Thanks to Congress, the States do have an effective and constructive role in the development of OCS resources under NEPA, the Coastal Zone Management Act, and sections 18 and 19 of the Outer Continental Shelf (OCS) Lands Act.

Incidentally, with respect to section 19 of the OCS Lands Act, there are three important factors. One is that under section 19, the Secretary of the Interior deals with the highest elected official in the State, the governor.

On that point, let me just digress for a minute to tell you something I did a little checking on. I checked with the Department of the Interior's OCS office in California to find out how they handled the section 19 deliberations with the State of California on the last offshore California sale, which was sale 80. They sent me a report of all the meetings they had, and I find it rather impressive. The Interior Department held 18 meetings before the sale. They held another 12 after the sale. And the result was that 49 percent of the acreage considered for leasing was deferred in the presale process. I think that speaks well for that part of section 19.

Another factor under section 19 of the OCS Lands Act is that the Secretary of the Interior deals with every affected State, not just those States that have a coastal management program. And there are two coastal States that is particularly important to, Georgia and Texas.

A third factor in the way section 19 has worked is illustrated by the example I just cited, and that is Secretary Hodel's leadership in working with the States at the earliest possible stage—with the governors and officials of the States.

Now, also regarding OCS lease sales, one must remember that the States exercise clear consistency review responsibilities under section 307(c)(3)(B) of the Coastal Zone Management Act over the Federal licensing and permiting activity not once, but twice. First, each plan of exploration requires a consistency certification, and then if the oil company wants to go ahead and develop its lease, a second consistency certification is needed for the development plan. Thus, every well, every platform, every pipeline, and every shoreline support facility which has an effect on any land or water use in the coastal zone is subject to State consistency concurrence.

I therefore believe that this combination of Federal laws provides the very cooperation and consultation that you are seeking.

Thank you.

[The statement follows:]

STATEMENT OF PETER L. TWEEDT, DIRECTOR, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, NOAA

Mr. Chairman and members of the committee, I welcome the opportunity to testify today on the Federal consistency provisions of the Coastal Zone Management Act and S. 1412, a bill to amend Section 307(c)(1) of the CZMA. The Department of Commerce opposes S. 1412.

The Coastal Zone Management Act of 1972 (the CZMA, P.L. 92-583, as amended) establishes a national program to promote the wise use and protection of coastal land and water resources. The CZMA encourages and assists States and territories in dealing with the increasing demands for the use of the Nation's coastal areas.

Technical and financial assistance and policy guidance are provided to State and territorial governments to develop and implement coastal zone management programs. The National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management (NOAA/OCRM) administers the CZMA. The financial assistance component of this program has accomplished its original purposes and its proposed for termination in the FY 88 budget.

The Federal consistency provisions of the CZMA require that Federal agency activities which directly affect the coastal zone be conducted in a manner consistent to the maximum extent practicable with the federally approved coastal zone management programs. Section 307 of the CZMA establishes standards and procedures for State consistency review of four basic types of activities: direct Federal agency activities, including development projects under Section 307(c)(1) and (2); federally-licensed or permitted activities under Section 307(c)(3)(A); Outer Continental Shelf (OCS) exploration, development and production plans under Section 307(c)(3)(B); and Federal assistance to State and local governments under Section 307(d). The Federal consistency regulations at 15 CFR Part 930 describe the procedures and responsibilities of Federal and State agencies and of private parties seeking Federal approval for proposed projects.

The legislative history of the CZMA shows that Congress created the Federal consistency process in an effort to advance the national interest in the effective management, beneficial use, protection and development of the coastal zone while acknowledging that the key to effective coastal zone management is to encourage the States to exercise their full authority over land and water uses in the coastal zone through effective consultation and coordination.

NOAA supports these goals. The Federal consistency provisions are a critical part of this Nation's coastal zone management system. They affect the daily business of many Federal agencies as they act to carry out the mandates of numerous Federal laws. The Federal consistency provisions also affect many other interests: large and small businesses and industries, individuals and public groups, towns and communities. Adding to the complexity of the system are the different administrative procedures of each of the 29 coastal States with approved coastal zone management programs.

S. 1412 would amend Section 307(c)(1) to provide that Federal activities "significantly affecting" the natural resources or land or water uses in the coastal zone be "fully consistent" with approved coastal zone management programs. S. 1412 would apply to any Federal activity whether occurring within, seaward, or landward of the coastal zone unless the activity was undertaken to counter the immediate effects of a declared national emergency, was necessary for reasons of national security, was required by a provision of another Federal law which prevents consistency, or was undertaken pursuant to the Magnuson Fishery Conservation and Management Act.

As background, I would like to review quickly the current NOAA procedures under which consistency reviews of Federal agency activities occur. Under the NOAA regulations which implement Section 307(c)(1), Federal agencies determine which of their activities directly affect the coastal zone of States with approved management programs. If the agency finds such a direct effect, then the agency must provide a consistency determination to the State at the earliest practicable time in the planning of the activity but at least 90 days before final approval of the Federal activity. If the State disagrees with the Federal agency's consistency determination and the disagreement cannot be resolved, the Federal agency may proceed with its activity unless the State obtains a court order prohibiting such action.

In 1984, the Supreme Court decided in *Secretary of the Interior et al.* v. *California et al.* that OCS lease sales are not subject to the Federal consistency provisions of Section 307(c)(1). NOAA supports this decision. As a result of the Supreme Court's decision, NOAA examined its regulations, located at 15 C.F.R. Part 930, to determine whether any changes were necessary. NOAA published an Advanced Notice of Proposed Rulemaking in 1984 (49 Fed. Reg. 22825) announcing its intention to review its regulations in light of the Supreme Court decision. NOAA held eight regional meetings and received comments from Federal agencies, State and local governments, representatives of environmental and developmental interests and the general public. As a result of these meetings and comments, NOAA promulgated a final rule which made the regulatory change required by the Supreme Court's decision. We amended Sections 923.11 and 930.33(c) of our regulations to reflect this change.

The Supreme Court's decision confirmed the OCS lease sales are not subject to review under Section 307(c)(1), and NOAA believes the consistency review of OCS lease sales is neither necessary nor desirable. Regarding OCS lease sales, one must remember that the States exercise clear consistency review responsibilities under

Section 307(c)(3)(B) of the CZMA over the Federal licenses and permits necessary for activities described in detail in the Plans of Exploration (POEs) and the Development and Production Plans (DPPs) required by the OCSLA. The Supreme Court opinion expressly recognizes the State's jurisdiction at this stage of OCS development. The CZMA, administered together with other environmental and resource management laws, provides ample opportunties for constructive and meaningful State/Federal collaboration.

The States do have an effective and constructive role in the development of OCS resources. In this regard, NOAA applauds the efforts of the Department of the Interior to build meaningful consultative steps, regarding State consistency concerns, into the early stages of the OCS leasing process through the review and consultation procedures provided by Section 19 of the Outer Continental Shelf Lands Act and by the National Environmental Policy Act (NEPA). These administrative efforts and the flexibility they allow are the best means to resolve resource use conflicts.

A legislative change from "directly affecting" to "significantly affecting" is not needed and could confuse the administration of the consistency review process with the NEPA process. The present situation in which each Federal agency determines, on a case-by-case basis, whether a proposed activity directly affects the coastal zone has generally worked without controversy.

In 1984, NOAA initiated a study of the Federal consistency process. NOAA received information from affected Federal agencies, States with federally-approved management programs, environmental groups and representatives of industry. On May 1, 1985, NOAA announced the availability of the Draft Federal Consistency Study and requested comments on the draft. The Study is available to the public, and the information in it has been used in discussions of the Federal consistency process.

The Study showed that, on an annual basis in 1983:

Under Sections 307(c)(1) and (2) the States concurred in about 93-95 percent of the approximately 400-500 direct Federal activities reviewed;

Under Section 307(c)(3)(A), the States concurred in about 90-95 percent of the approximately 500 Federal licenses and permits reviewed;

Under Section 307(c)(3)(B), the States concurred in about 99 percent of the nearly 435 plans for OCS exploration (POEs), and development and production (OPPs) reviewed; and

Under Section 307(d) the States concurred in over 99 percent of the nearly 2100 Federal assistance proposals reviewed.

Although NOAA has not conducted a statistical analysis of more recent years, the information available indicates that these general trends hold. Federal consistency works and we expect it to continue to work well in most instances.

NOAA works closely with State and Federal agencies on a routine basis to assure compliance by providing general policy guidance and case-specific technical assisance. Based on NOAA's experience, we conclude the legislative changes to the consistency process are not needed. Therefore, the Department of Commerce opposes S. 1412.

Thank you for the opportunity to discuss the Federal consistency process. I am available for questions.

Senator **Kerry**. Thank you very much, Mr. Tweedt.

Mr. Hookano, do you want to go next and then go to Mr. Bettenberg? Are you happy with that?

Mr. **Hookano**. That would be fine.

Senator **Kerry**. Did I pronounce that correctly? Is it Hookano?

Mr. **Hookano**. It is Hookano, yes, Senator.

Senator **Kerry**. OK, thank you.

STATEMENT OF THOMAS HOOKANO, DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. **Hookano**. Mr. Chairman and members of the committee, I am Thomas Hookano, Deputy Assistant Attorney General in the Land and Natural Resources Division.

I am pleased to appear before you here today to discuss S. 1412 and the consistency provisions of the Coastal Zone Management Act of 1972. I welcome the opportunity to address these subjects and also to answer any questions that you may have. But before I begin my brief remarks and also noting the fact that the Chairman is going to put my written statement into the record, I would like to make a few preliminary remarks.

Being a native of California, particularly having been raised in an area near the coast, and one whose family is from the State of Hawaii, and also just having had the opportunity to tour the great State of Alaska last week, and particularly the Arctic National Wildlife Refuge and coastal resources in that area, I have a deep personal interest in seeing that the Coastal Zone Management Act works well and that our invaluable coastal resources be protected. It is with that interest and perspective in mind that I carry out my responsibilities at the Department of Justice.

I would like to make some general observations regarding the Coastal Zone Management Act, particularly regarding opportunities it provides for meaningful State participation in the consistency process and coordination with other Federal activities.

From our perspective at the Department of Justice, the implementation of the consistency provisions seems to be working very, very well indeed. The interests of the coastal States are given that full consideration accorded by the Coastal Zone Management Act, and amicable and, I think, just resolutions of any differences of opinion between the States and the Federal Government regarding consistency are in the vast majority of cases reached through the administrative process. In this manner that delicate balance of State and Federal interests embodied in the consistency provisions of the CZMA is maintained, and all parties are able to pursue their unique interests in coastal zone management.

A related point also needs to be made. In our view the consistency provisions were not intended to provide the States with an absolute veto over Federal actions. Rather, the provisions are designed to encourage cooperative federalism. S. 1412 in our opinion would approach giving the States that absolute veto which would destroy a cooperative federalism approach.

The infrequency of litigation over the consistency provisions and the very unusual facts presented in the cases which have been brought to my attention and the attention of the Division bear witness to how well indeed the system is working. It must be emphasized that in carrying out our responsibilities we are trying to maintain that range of interest expressed in the CZMA, and not to foreclose meaningful State participation in the process.

I would like to make one further preliminary point before addressing S. 1412. And that is, as you all know, the Coastal Zone Management Act is not the only statute that operates to assure adequate protection in the coastal zone. There is a full range of Federal environmental laws, such as the National Environmental Policy Act, the Endangered Species Act, the Marine Mammal Protection Act, the Clean Water Act—and I could go on and on—that provide opportunities for States in coastal areas to have meaningful input regarding activities in the coastal zone and the Federal outer continental shelf.

Since all of these laws are administered together, there are ample opportunities, as I just stated, for constructive input to the

Federal Government with regard to its activities and meaningful opportunities for collaboration.

With these preliminary points in mind, I would like to address S. 1412. I am not going to recount the provisions of the proposed legislation here. In our view, however, the proposed legislation will not clarify the State and Federal responsibilities for coastal zone management or enhance the opportunities for constructive resolution of differing views as to responsible management of coastal resources. It is likely to create uncertainty, and it is also likely to engender unnecessary litigation that would undermine the carefully designed system of balances that has made the CZMA work so well.

One principal objection to S. 1412 that we have is that it will dramatically expand the scope and applicability of section 307(c)(1) of the CZMA. The legislation incorporates the term "significantly affecting" to trigger consistency with approved State management programs unless one of the four enumerated exceptions in the proposed legislation is applicable to a Federal activity.

The intent clearly appears to be to establish a standard that could be used with reference to the National Environmental Policy Act. And I believe, Senator Kerry, you made that reference in your statement introducing the legislation. The intent would also be, therefore, to carry with it the limitations developed under the NEPA case law.

However, by simply using the term "significantly affecting," the amendment fails to adopt the rest of the NEPA standard which provides the limiting language. Under NEPA, activities are considered in terms of how they may affect the quality of the human environment. Thus, impacts are cognizable under NEPA only where they are significant to the ecosystem as a whole, and as a result small and de minimis impacts need not be considered. Under the proposed amendment, impacts will be considered in the context of how they may affect the natural resources; we believe this standard would expand those areas which require consistency review quite dramatically and would have an unintended effect.

In the interest of time, I refer the Chairman and members of the committee to my written statement, and would be pleased to answer any questions that you may have.

Thank you.

[The statement follows:]

STATEMENT OF THOMAS E. HOOKANO, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Committee on Commerce, Science, and Transportation and the National Ocean Policy Study, I appreciate the opportunity to appear before you today to discuss the consistency provisions of the Coastal Zone Management Act (CZMA) and, specifically, S. 1412, legislation to amend Section 307(c)(1) of the CZMA. Our coastal areas represent a significant environmental and economic resource to the nation and demand a carefully crafted process to ensure the preservation and protection of the legitimate interests of both the states and the federal government. The CZMA provides just such a foundation for decisionmakers to use in reconciling these often competing interests. As we will explain in detail in this testimony, S. 1412 threatens to undermine the system of balances that has made the CZMA work well during its fifteen year history and we therefore strongly oppose its enactment.

The consistency provisions of the CZMA are of fundamental importance to the achievement of the act's objectives. I must note at the outset that from our own observations as well as from those of our sister agencies, the Departments of Commerce and the Interior, the consistency provisions are working well. The interests of the coastal states are given the full consideration accorded by the CZMA and amicable and just resolutions of any differences of opinion between the state and federal governments regarding consistency are, in the vast majority of cases, reached through the administrative process. In this manner, the delicate balance of state and federal interests embodied in the consistency provisions of the CZMA is maintained and all parties are able to pursue their unique interests in coastal zone management.

In order to understand the state-federal balance of interests in the CZMA, a related point must also be made. In our view, the consistency provisions were not intended to provide the states with an absolute "veto" over federal actions. Rather, these provisions are designed to encourage cooperative federalism. The infrequency of litigation over the consistency provisions, and the unusual facts presented in the cases which have been brought, bear witness to how well this system of balancing generally works. It must be emphasized that in carrying out our responsibilities, we are trying to maintain the range of interests expressed in the CZMA, not to foreclose meaningful state participation in the process.

I must make one additional observation regarding the respective responsibilities of the states and the federal government in coastal zone management. The CZMA is not the only statute that operates to assure adequate protection of the coastal zone. There is a full range of federal environmental laws, such as the National Environmental Policy Act, Endangered Species Act, Marine Mammal Protection Act, Marine, Protection, Research and Sanctuaries Act, Clean Water Act, and Outer Continental Shelf Lands Act, which apply to both state coastal areas and to activities on the federal outer continental shelf. Since all of these environmental and resource management laws are administered together, there are ample opportunities for constructive and meaningful state/federal collaboration. As a result, even under the limited circumstances when consultation and review under the consistency provisions of the CZMA may not be appropriate, there are other mechanisms in place to ensure that the states' interests are recognized and addressed.

With these observations in mind, let me turn to our comments on S. 1412, a bill to amend Section 307(c)(1) of the CZMA. This amendment would direct each federal agency conducting or supporting activities "significantly affecting the natural resources or land or water uses in the coastal zone" to conduct or support such activities in a manner "fully consistent" with the enforceable, mandatory policies of the approved state coastal zone program unless one of four specific exemptions applies. These exemptions include when a federal activity is (1) undertaken to counter the immediate effects of a presidentially declared national emergency, (2) undertaken by the Secretary of Defense and necessary for national security reasons, or (3) required by federal law that prevents consistency with any provision of an approved state coastal zone program. A federal agency may exercise one of these three exemptions, and thereby deviate from full consistency, only to the extent justified by the presence of the circumstance. A fourth exemption provides that a federal activity may deviate from full consistency when it is undertaken pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801, et seq.

In our view, this legislation will not clarify state and federal responsibilities for coastal zone management or enhance the opportunities for constructive resolution of differing views as to responsible management of coastal resources. Rather, it is likely to create uncertainty and engender unnecessary litigation that would undermine the carefully designed system of balances that has made the CZMA process work well.

THE AMENDMENT WILL DRAMATICALLY EXPAND THE SCOPE AND APPLICABILITY OF SECTION 307 (C) (1) OF THE CZMA

By incorporating the same trigger as that found in the National Environmental Policy Act (NEPA), the term "significantly affecting," it appears that an attempt was made to establish a standard that could be used with reference to NEPA and would thereby carry the limitations developed under NEPA case law. However, by simply using the term "significantly affecting," the amendment fails to adopt the rest of the NEPA standard, which provides the limiting language. Under NEPA, impacts are considered in the context of how they might affect the "quality of the human environment." Thus, impacts are properly cognizable under NEPA only where they are significant to the ecosystem as a whole and, as a result, small and de minimis impacts need not be considered. Under this proposed amendment, however, impacts will be considered in the context of how they might affect the "natural resources or land or water uses in the coastal zone." Under this standard, virtually every identifiable impact, environmental or otherwise, would be subject to consistency review.

Moreover, by looking to NEPA and the Council on Environmental Quality (CEQ) regulations for guidance, this amendment could require the consideration of more than economic and environmental factors. Under 40 C.F.R. 1508.8, the CEQ regulations include the consideration of effects such as "aesthetic, historic, cultural, economic, social, or health" as elements in agency decisinmaking. Thus, not only would this amendment pull insignificant impacts into the CZMA process, but it could also encompass impacts that bear little, if any, relationship to the substantive goals of the CZMA.

The net result, of course, is that indirect, remote, speculative, and de minimis impacts will be raised to subject federal activities to CZMA consistency review. This results in a drastic expansion of the CZMA in both substantive and geographic terms. This expansion will inevitably lead to greater conflicts between the state and federal governments and among the states as well.

Without question, a whole host of federal activities may be swept into the CZMA process and made subject to its consistency requirements. For example, revenue rulings relating to the tax consequences of owning a vacation home or the depreciation of fishing vessels, both of which can affect land and water uses in the coastal zone, would be subject to full consistency with approved state programs under the CZMA.

Federal activities regarding fish and wildlife management could also be substantially affected by the amendment. The term "natural resources" in this legislation would encompass wildlife and migratory waterfowl and their habitat. By requiring federal agencies to ensure that their activities are "fully consistent" with state programs, an agency such as the U.S. Fish and Wildlife Service could be forced to comply with competing and potentially conflicting state CZMA programs in managing migratory birds and their habitat, instead of developing a comprehensive regional or national program to protect the resource. In addition, since this legislation does not contain clear legal authority for agencies to follow standards that are more environmentally restrictive than policies of states' coastal zone management programs, the National Park Service, for example, could find itself faced with state challenges to park management plans that were carefully developed to preserve fragile coastal park areas.

The focus of the consistency provisions of the CZMA is to ensure that federal activities with impacts directly affecting the coastal zone are consistent with federally approved state programs for the coastal zone. The reformulation of Section 307(c)(1) contained in this legislation would greatly expand the scope of activities requiring consistency determinations, irrespective of their relationship to coastal zone values, and would elevate coastal zone concerns above those of the rest of the nation, possibly to the detriment of inland areas.

Moreover, because many federal programs and projects are designed to benefit regions instead of individual states, the expansion of the scope of the CZMA will inevitably lead to interstate conflict. For example, a flood control, water supply, or navigation project designed to benefit an entire region might ultimately be jeopardized by the coastal program of a downstream coastal state, which may not see any local benefit from the project. Other federal projects, such as inland waterway projects originating hundreds of miles from the coastal zone but passing through the coastal zone, could be particularly vulnerable because the coastal state might perceive the inland ports as being in direct competition with their own open water ports. The opportunities for a state with an approved coastal zone management program to block or delay such projects under this amendment could be endless.

In enacting the CZMA, Congress recognized the fact that in appropriate circumstances, regional and national interests should take priority over the individual concerns of a coastal state. Accordingly, Congress adopted a procedure allowing the Secretary of Commerce to override state objections to federal permits in the coastal zone. This amendment, however, affects activities under Section 307(c)(1) that do not involve federal permitting and cannot be appealed to the Secretary of Commerce for an override. Thus, by requiring full consistency for these activities, the amendment would, in effect, grant a coastal state a "veto" over activities that have significant national and regional implications. Navigation and regional water projects are just two of the multi-state activities that could be subject to such a "veto."

This amendment clearly would create results unintended by Congress when it framed the CZMA. From an individual coastal state's perspective, this amendment may appear attractive because it significantly increases state coastal management authority. However, when viewed from the perspective of inland or adjacent coastal states or from the national perspective, this increase in coastal state authority should rightfully be viewed with concern: It may threaten the delicate balance of individual and collective state interests that serve as the basis of our federal system. It will also burden the CZMA process with countless consistency determinations that have only a minimal relationship with the primary coastal values the act seeks to protect.

USE OF THE "SIGNIFICANT" STANDARD IN THE AMENDMENT WILL RESULT IN ADDITIONAL LITIGATION

Apart from the question of whether Congress should expand the scope and coverage of the CZMA to this extent, a separate concern is whether this amendment will produce greater certainty in the CZMA process. In our view, the proposed amendment will make the requirements of the CZMA less certain and federal agencies trying to comply with the act will not be able to anticipate how a given state plan might be applied in a particular situation. This uncertainty maximizes the opportunities for conflict and enhances the likelihood of litigation.

As previously discussed in this testimony, the use of the term "significantly" appears to be an attempt to incorporate NEPA standards into the CZMA. Our experience in litigation both NEPA and CZMA cases leads us to the firm conclusion that this approach is extremely unwise. Contrary to the perceptions of many, the definition of "significantly" is not at all clear cut. While the CEQ regulations are helpful, they provide general guidance. Thus, even though NEPA has been implemented for almost two decades, the issue of significance has been and continues to be frequently litigated. It must be recognized that parties opposed to certain federal activities are likely to insist that virtually any identifiable impact can be interpreted as a significant one, which would, under this legislation, fall within the consistency requirements of Section 307(c)(1). Accordingly, greater uncertainty, rather than certainty, in the application of the coastal zone management program would result from use of this term. It will then fall on the courts to decide, on a case by case basis, what impacts are encompassed by this term.

The problem with the uncertain definition of the term "significantly" becomes even more acute in the context of the CZMA. Unlike NEPA, which designates the CEQ as the entity to provide some uniformity in its application, the CZMA involves reliance upon a state's interpretation and application of its federally approved program. Thus, the term "significantly" would be subject to interpretation by all of the states with approved state coastal zone management programs. What may well be declared insignificant by one state under its plan might be declared significant by another under its program. Given the general "goal oriented" approach of most state programs, federal agencies would have little guidance as to what might be required of them in a given context.

Nor will court decisions from the inevitable litigation provide the direction and guidance that is absent in this proposed measure. Because many of the approved state coastal management programs contain certain policies that are broad in scope and uncertain in application, the courts will lack the standards necessary to decide consistency issues unless they simply defer to whatever the coastal agency says that its program requires.

This result undercuts one of the primary objectives Congress originally established for the CZMA: Predictability. As is evident from a review of Section 307 (a) and (b) of the CZMA, Congress sought to avoid conflict between federal and state interests by providing for federal review of the state coastal management programs before they became effective. Requiring federal agencies to achieve full consistency under the terms of S. 1412 with state management programs would only work if the federal agencies knew, in advance of program approval, what was required of them and when those requirements were to be applied. Because full consistency was not required when coastal management plans were approved, many important safety and environmental protection functions performed by federal agencies throughout the coastal zone may be hampered by a requirement for full consistency. Functions of this sort include those of the Coast Guard, such as search and rescue, establishment and maintenance of aids to navigation, vessel traffic, and port safety. Full consistency in these functions could result in wasteful disputes and delays in necessary actions causing loss of life and possible environmental harm.

Based upon our years of struggling with issues such as these in NEPA litigation, we do not believe that this proposed amendment will provide the level of predictability needed. Given the inherent difficulty in determining what the indirect, remote, or speculative impacts of federal activities may be and the requirement for all agencies to guarantee full consistency for all such activities, this amendment may spawn a generation of divisive litigation that could sharpen federal/state conflicts.

THE EXEMPTIONS IN THE AMENDMENT WILL LEAD TO NEW QUESTIONS ABOUT THE SCOPE AND APPLICABILITY OF THE CONSISTENCY PROVISIONS

The provisions in S. 1412 for exemptions from full consistency also raise questions regarding the scope and applicability of this amendment. While the national emergency and national security exceptions are fairly specific, exemption (iii), an activity "required by any provision of a Federal law which prevents consistency with any provision of an approved state coastal zone management program," is essentially meaningless. Section 307(e) of the CZMA provides that "[n]othing in this chapter shall be construed . . . as superceding, modifying or repealing existing laws applicable to various federal agencies." Since Section 307(e) already disposes of conflicts between consistency requirements and ministerial or mandatory federal actions, the proposed exemption addresses only discretionary federal activities, which, by their nature, may or may not be undertaken by an agency decisionmaker. In such instances, a federal agency is never "prevented" from achieving consistency. Thus, this proposed exemption offers no meaningful relief from consistency requirements.

The fourth exemption in the amendment, for activities undertaken pursuant to the Magnuson Fishery Conservation and Management Act, is clear in its result. However, it also prompts the question why activities under this act alone should be singled out for exemption from full consistency. There are numerous other environmental protection statutes which could be argued to warrant similar treatment under the amendment.

In closing, over the course of the past fifteen years of CZMA implementation, we have achieved a process whereby state and federal interests can usually be resolved in a mutually satisfactory manner. Primary land-use priorities have been established in state coastal zone plans, giving state program managers both the direction and the flexibility needed to meet state coastal management goals. At the same time, the consistency provisions of the CZMA have encouraged federal decisionmakers to be mindful of state planning objectives and to conform federal activities, to the maximum extent practicable, to requirements of approved state programs. In this manner, the cooperative federalism envisioned by the CZMA—representing the interests of federal and state governments as well as all interests in the community who seek achievement of development and environmental protection goals—can be realized.

If S. 1412 is enacted, the critical balance of authority that makes the CZMA an effective and valuable tool in natural resources management would be upset. Because of the expansive and underfined terms used in this legislation, many new activities may be made subject to the CZMA, regardless of their relationship to the coastal values the act seeks to protect. In addition, it is our view that this amendment would ultimately result in additional and costly litigation, rather than fostering a cooperative working relationship between the state and federal governments. Given the importance of the CZMA program and the disruptive effects of this amendment, we strongly oppose enactment of S. 1412.

This concludes my written testimony. I shall be glad to answer any questions you may have.

Senator KERRY. Thank you very much.

Let me just say for the record that all statements will be printed in full in the record, and we thank you for their timely submission.

In addition, we will leave the record open for the submission of written questions to any witness by any member of the committee.

Mr. Bettenberg.

STATEMENT OF WILLIAM D. BETTENBERG, DIRECTOR, MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR

Mr. BETTENBERG. Senator, it is a pleasure to be here.

I am Director of the Minerals Management Service. We are responsible for what we consider to be an extremely important national program. It is probably not well-known, but we think of our program more as a natural gas program than as an oil program even though often we are referred to as the organization involved in oil leasing.

Currently leases from the Outer Continental Shelf supply one-quarter of the Nation's supply of natural gas, and approximately one-eighth of its domestic supply of oil. Between those two, we now account for nearly one-quarter of the Nation's reserves of oil and gas combined. The potential remaining resources are probably more significant than that compared to onshore resources.

The program also is demonstrably a safe program from an environmental point of view. If you look at it from the standpoint of fates and effects, oil spills, so forth, you will find that in fact it is a carefully planned, carefully regulated and carefully monitored program.

I have heard several comments today about the need for States to have an opportunity to review and provide input into the program. And frankly, some of those comments almost take my breath away from the standpoint of what the law requires, and what current practice actually is.

When we develop a 5-year program, we——

Senator **Kerry**. Some of the comments where?

Mr. **Bettenberg**. Yours, Senator Wilson's——

Senator **Kerry**. I just wanted to make certain that we were——

Mr. **Bettenberg**. When we develop the five year program, we start out the process by going to the States, the governors, and asking for their views and comments. We repeat that two more times during that process with review periods of 60 days and 90 days. We have representatives of all of those governors on our OCS Policy Committee. We meet with that group approximately twice a year and keep them posted on all of the activities involved in development of the 5-year program. We have constant interaction with those people.

When we go through the process of a lease sale, we do the same thing. We start the process asking for comments on the individual lease sale from the Governor. We proceed to develop an environmental impact statement on that lease sale. Comments are made on that environmental impact statement and we work with the States in terms of developing a list of issues to be addressed in the environmental impact statement. Once the final environmental impact statement is out, we send a proposed notice to the Governor or Governors and give them at least 60 days for review and comment.

We are required under section 19 of the OCS Lands Act to then subject all those comments to a balancing test, and the term "balancing" is probably the most important word that ought to be used here today. We are required to balance the State's interest as expressed by the Governor with national needs and national requirements. We look at those interests very, very carefully.

If at this point we proceed to a lease sale, which I note is essentially a real estate transaction—that is, we are selling interests in leases; companies are paying us money. The only thing that passes at that point is paper. Companies then have an opportunity to acquire the necessary permits and proceed to exploration, and if something is discovered, to development.

The exploration plans are reviewed by the State both under the context of the coastal zone management program, as well as separately from the coastal zone management program. Development plans similarly are subject to a section 19 review under the OCS Lands Act, as well as a coastal zone management program review and other reviews.

At the exploration and development phases we are talking about things that are not hypothetical scenarios. At a lease sale stage, you are talking about hypothetical scenarios, and you are confronted typically with coastal zone management plans that are vague. Therefore, it is very difficult to develop a consistency determination at a lease sale stage when you are dealing with hypothetical scenarios and vague State coastal zone management programs.

At the development and exploration plan stage, as envisioned in the law and by the drafters of those laws, you are dealing with real things and real potential impacts. And they can then be weighed, examined and reviewed.

We heard a lot about the California program this morning. Our concerns there I think are not idle concerns. We heard about the number of projects that were approved.

But to wrap up my testimony, I would simply refer the committee to a letter of April 18, 1986, from the Executive Director of the Commission indicating that on April 10, 1986, the California Coastal Commission voted to oppose any leasing offshore California during the 5-year program—1987 to 1991—not a hypothetical thing here that we are talking about. The California Coastal Commission voted to ban all leasing. And you can understand what kind of a reaction we will get as individual lease sales occur in California under that plan or as exploration-development plans are brought forward.

Thank you, Mr. Chairman. I would be pleased to respond to any questions that you have. I would, if I might, appreciate the opportunity to respond in writing to some of the comments made so far this morning.

[The statement follows:]

STATEMENT OF WILLIAM D. BETTENBERG, DIRECTOR, MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and members of the Committee. I am pleased to be here to present the views of the Department of the Interior on S. 1412, a bill to amend the Federal consistency provisions of the Coastal Zone Management Act (CZMA). We appreciate the opportunity to testify since the bill would have profound effects on many programs of our Department. It would affect the management of Federal lands and the conduct of other Federal activities by the U.S. Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, Minerals Management Service and other Interior agencies. As I am sure you are aware, the bill would also affect activities of other Federal departments.

Because many of these effects would adversely impact Federal activities the Department of Interior strongly opposes enactment of S. 1412.

In general, the bill proposes three changes to the text of section 307(c)(1) of the CZMA. The first concerns the activities to which section 307(c)(1) would apply. Currently, this section applies to each Federal agency conducting or supporting activities "directly affecting the coastal zone." Under the proposed bill, it would apply to each Federal agency conducting or supporting an activity "significantly affecting the natural resources or land or water uses in the coastal zone." The second change concerns the State coastal program provisions which the Federal action is to be measured against. Currently, the Federal agency's action must be consistent with "approved state management programs." Under the proposed bill, however, the agency's action must be consistent with "the enforceable, mandatory policies of approved State management programs." The third change concerns the degree to which a Federal activity must be consistent with an approved State program. Currently, the Federal activity must be consistent "to the maximum extent practicable." Under the proposed bill, the Federal activity must be "fully consistent" with the mandatory policies of the State program unless that activity meets any of four conditions listed below: It is undertaken to counter the immediate effects of a national emergency declared by the President; it is undertaken by the Secretary of Defense when necessary for reasons of national security; it is required by any provision of a Federal law which prevents consistency with any provision of an approved State program; or it is undertaken under the Fishery Conservation and Management Act (FCMA).

Under the first three conditions, the agency may "deviate from full consistency only to the extent justified by the presence of such circumstance." The bill completely exempts any Federal activity under the Magnuson Fisheries Conservation Management Act (FCMA) from consistency with approved State CZM programs.

Mr. Chairman, the Department of the Interior strongly opposes this bill for several reasons. Permit me to summarize the reasons first, then elaborate upon them later in my testimony.

First, although the sponsors of this bill argue that S. 1412 would merely restore Congress's original intent in enacting section 307(c)(1), this bill does not do so and indeed goes beyond the original intent.

Second, in departing from the intent of Congress, the bill could create substantial conflict between coastal states and inland states. As an extreme illustration of the problem, because of the sponsors intent to reach activities landward of the coastal zone, this bill could make Federal activities in the 24 States in the Mississippi River watershed subject to consistency review under the Louisiana coastal program if a causal relationship could be established for effects in Louisiana's coastal zone from upstream sources.

Third, the sponsors' stated intent to apply the requirements of section 307(c)(1) to OCS lease sales would not improve review of effects on the coastal zone and could seriously hamper efforts to lease oil and gas resources. At the leasing stage, too little is known about where lease activities may eventually occur and to what extent exploration and development may occur. There is no clear understanding of specific effects on the coastal zone at the leasing stage.

Fourth, there is no need for this bill. To the extent that this bill would reach activities landward of the coastal zone, the CZMA already provides coastal states with the authority to define their inland coastal boundaries to control shoreland uses which have direct and significant impacts on coastal waters. Likewise, to the extent the bill would reach activities on OCS leases, coastal states already have sufficient authority to review the individual and cumulative effects of OCS plans on land uses and water uses in the coastal zone under section 307(c)(3)(B).

Fifth, a typical reason for conflict between Federal agencies and State programs is that the mandatory and enforceable polices of these state CZM programs are often vague. The National Oceanic and Atmospheric Administration (NOAA), under its authority to review state programs under section 312 of the CZMA, is trying to bring clarity to the policies the coastal states wish to enforce. For this bill to expand the scope of activities subject to section 307(c)(1) while that effort is underway will exacerbate, not relieve, conflict.

Finally, by abandoning the phrase "to the maximum extent practicable," the bill departs from settled law and shift the authority to the states to make decisions that are properly made at the Federal level. The shift will foster conflict and litigation and may result in decisions not in the national interest.

S. 1412 GOES FAR BEYOND THE INTENT OF SECTION 307 (C) (1)

When introducing this bill last June, its sponsors stated that the bill was needed to carry out the original intent behind section 307(c)(1). In the view of the sponsors, the Supreme Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), had misperceived Congressional intent in ruling that OCS lease sales are not federally conducted or supported activities directly affecting the coastal zone.

In the June 23, 1987 Congressional Record (page S 8468), Senator Hollings remarked: "[T]he intent of the Coastal Zone Management Act, as well as its lengthy legislative history, make abundantly clear what is meant by that section. The provision focuses on the results of the Federal activity in question, and on the potential impact the activity will have on a State's coastal zone. It is not merely focused on the location of that Federal activity."

In the view of the sponsors, as long as a federal activity causes a "significant effect" on the coastal zone, regardless of where it is located, it must be fully consistent with the approved State CZM program.

However, review of the legislative history of the CZMA in 1971 and 1972 shows that S. 1412 expands the scope of section 307(c)(1) far beyond what Congress originally intended. As reported by the Senate Committee on Commerce in 1972, S. 3507 (the bill ultimately signed by the President) limited the scope of Federal activities governed by section 307(c)(1) (designated in the bill as section 314(b)(1)) to those "in the coastal zone." [1]

S. 3507 defined "coastal zone" to have a meaning essentially identical to the definition ultimately enacted. Its seaward limit was the "outer limit of the United States territorial sea," which extends three miles offshore. Consequently, the coastal zone did not extend onto the outer continental shelf, which generally begins three miles offshore. Its inland limit was to be landward from the shore "only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters." [2] The definition of "coastal zone" in S. 3507 excluded "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." During the same Congressional session, the House Committee on Merchant Marine and Fisheries reported out H.R. 14146. Like S. 3507, it applied only to Federally conducted or supported activities "in the coastal zone." [3] Significantly, in reporting out this language, the Committee refused to adopt an amendment proposed by the Coastal States Organization (CSO) which would have applied section 307(c)(1) to activities landward and seaward of the coastal zone. Specifically, CSO proposed that Federal activities be subject to consistency review if they were in "or adjacent to" the coastal zone.[4] But the Committee, as I indicated, did not adopt this proposal.

Consequently, when these two bills went to conference, the Conference Committee agreed that section 307(c)(1) would not apply to Federal activities on the OCS or landward of the physical coastal zone. To resolve the one major disagreement between Houses, the Conference Committee held that Federally-owned lands in the coastal zone would be excluded from the definition of the coastal zone, but Federally conducted or supported activities on those lands directly affecting the coastal zone would have to be consistent, to the maximum extent practicable, with the approved State CZM program.[5]

In sum, the suggestion that Congress intended section 307(c)(1) to reach Federal activities outside the physical coastal zone is, in our view, inconsistent with the record.

S. 1412 COULD CREATE SUBSTANTIAL CONFLICT BETWEEN STATES

The theory behind S. 1412 is that consistency review under section 307(c) as a whole ought to extend to an activity based on its impacts, not its location. Cong. Rec. S. 8468 (June 23, 1987). Under this view, regardless of the location of the activity, the CZMA, as it is currently written, would require consistency review by coastal States for: Federally conducted or supported activities if they directly affect the coastal zone (Sec. 307(c)(1)); federally licensed activities if they affect land or water uses in the coastal zone (Sec. 307(c)(3)(A)); and federally assisted activities by State and local governments if they affect the coastal zone (Sec. 307(d)).

As we view the theory behind S. 1412, the state and local laws of a coastal state, when contained in an approved CZM program, would sweep with a broad arc inland across the nation. For example, flood control projects in the 24 States with rivers flowing into the Mississippi River would be potentially subject to the coastal zone program of Louisiana if they have any effect on Louisiana's coastal zone. The seward sweep of these laws would be just as impressive. The prospect of States trying to use their CZM programs to regulate activities beyond their borders is not speculation.

The State of North Carolina has already tried to use its program to regulate a Corps of Engineers project upriver in Virginia. (See *State of North Carolina* v. *Hudson*).

Even ardent advocates of expansive consistency review under the CZMA have warned of the dangers in the theory underlying this bill.

---

[1] S. Rep. No. 753, 92d Cong., 2d Sess., reprinted in Committee Print, Legislative History of the Coastal Zone Management Act of 1972, as amended in 1974 and 1976 with a Section-by-Section Index, 94th Cong., 2d Sess. 242 (1976 ["Legislative History"].

[2] Legislative History at 237.

[3] Ibid. p. 309.

[4] "Coastal Zone Management," Hearings Before the Subcommittee on Oceanography, Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 2492, H.R. 2493, and H.R. 9229, 92d Cong., 1st Sess. 461 (1971).

[5] Legislative History at 455, 457.

Such an interpretation of the CZMA runs the risk of being too open-ended. Projects such as a dam located in a different state hundreds of miles from the coastal zone might "affect" the coastal zone of a state at the river mouth, yet obtaining the certification of faraway state coastal authorities, or making Federal plans conform to the most practicable extent, seems a difficult burden for such activities. There is a need for . . . a presumption that no activities "affect" a state coastal zone within the meaning of the CZMA if they are not located within or directly offshore of the coastal state itself. . . .

[C]ourts should be wary of requiring a coastal state's certification for a project located in another state and important for that state's interest. The consistency requirements are designed to alter federal-state relations, and not to advantage coastal states vis-a-vis their inland neighbors. . . . Congress may have intended that activities by federal lessees requiring state certification under section 307(c)(3) be limited to activities within the boundaries of another state. This interpretive limitation would prevent a serious problem of comity between the states.[6]

S. 1412's approach is paradoxical, because in other environmental laws Congress has scrupulously avoided placing activities in one State under the jurisdiction of another. For example, Congress acted in the Clean Air Act to address the problem of air pollution originating in one State being carried by the winds into another State. Its solution, however, was not to give the affected State the authority to impose its rules on the source. Instead, it directed the source State to assure under its own rules that its sources would not cause violations of the national ambient air quality standards in neighboring States. Disputes are resolved not by the affected State, but by EPA. (Clean Air Act Sections 110, 126). Similarly, under the Clean Water Act, one who applies for a Federal permit to conduct an activity must submit a certification from the State in which the activity is located that the activity will comply with the pollution discharge requirements of the Act. Even if the discharge may affect another State, the applicant does not have to obtain a certification from the State. Instead, the Act leaves it to EPA to resolve any interstate dispute. (Clean Water Act Sec. 401). The Supreme Court's recent decision in *International Paper Co.* v. *Ouellette*, 107 S. Ct. 805, 813–14 (1987), is another illustration of Congress's refusal to allow one State to apply its pollution laws to sources of pollution in another State.

In sum, the theory underlying this bill runs counter to Congress' practice in solving interstate environmental problems.

S. 1412 IS UNNECESSARY

To the extent that this bill seeks to address concerns about Federal activities landward of the physical coastal zone, those concerns were addressed in the original CZMA. As I previously explained, the CZMA allowed the State to set the inland boundary of the coastal zone far enough inland to control activities that would have a "direct and significant impact on coastal waters." (CZMA Sec. 304(1)). Consequently, coastal States have already been given the means to review Federal activities "significantly affecting the natural resources or land or water uses in the coastal zone."

To the extent that this bill seeks to address concerns about the effects of OCS leasing, those concerns were addressed by Congress in 1976 when it made OCS exploration plans and development and production plans subject to consistency review in section 307(c)(3)(B). In adopting this change, the Conference Committee explained that 307(c)(3)(B) "specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. This provision will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans." [7] The Congress was correct. Section 307(c)(3)(B) has satisfied the needs of the coastal States. When reviewing OCS plans, they consider both the individual and cumulative effects of OCS activities on land or water uses in the coastal zone. In California, for example, this cumulative review is performed under section 30250 of the California Coastal Act. As a result, there is no need for an additional review of cumulative impacts before the Department offers OCS tracts for lease.

---

[6] (Breeden, Federalism and the Development of Outer Continental Shelf Mineral Resources, 28 Stanford Law Review 1107, 1135, n. 139 (1976)).

[7] Legislative History at 1080.

REQUIRING CONSISTENCY FOR OCS LEASE SALES NEEDLESSLY DISRUPTS ORDERLY LEASING OF OIL AND GAS RESOURCES

There is no need to amend the CZMA to require a consistency determination at the lease sale stage. The OCSLAA established a phased decisionmaking process for the leasing and development of OCS oil and gas resources. The procedures for implementation of this process have been reviewed at several levels of the judicial system and have been fully upheld.

The first step in the phased process is the development of a 5-year leasing program. Section 18 of the OCSLAA, which mandates the preparation of the 5-year program, requires development of procedures for "consideration of the coastal zone management program being developed or administered by an affected coastal State. . . ." The States were consulted during preparation of the program approved by the Secretary on July 2, 1987, for the 5-year period July 1987–July 1992. Appendix C of the program deals with the Laws, Goals, and Policies of Affected States and provides background on consideration of State comments regarding their coastal programs. In addition, Appendix L details the steps in offshore leasing for standard sales and documents opportunities for consideration of coastal programs during detailed presale planning. This section also obligates the Secretary to select the timing and location of leasing so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone. While the Secretary must strike a proper balance concerning the potential for coastal impacts, the Department has always maintained that a determination of consistency would be premature for the 5-year program. The States have generally agreed that a consistency determination at this stage would be premature. However, despite this general consensus, opponents of the program could try to use the new language in S. 1412 and argue that the preparation of a 5-year program could be a Federal activity "significantly affecting" the resources of the coastal zone under S. 1412.

The second step in the phased decisionmaking process is prelease planning, which culminates in a lease sale. We believe the sponsors of S. 1412 intend for consistency to apply at this stage.

However, since 1979, the Department of the Interior has emphasized that prelease activities are only a planning process which produce no actual effects on coastal natural resources or land or water uses in the coastal zone and the leasing itself is simply a property transfer transaction neither causing nor permitting further substantive action until exploration or development plans are submitted and approved.

Given the uncertain and hypothetical nature of information at this stage, it is impossible to make conclusive consistency determinations about subsequent OCS operations that might at some point affect the coastal zone. The language of the statute as proposed is not adequate to establish that prelease planning and conduct of a lease sale actually is an activity which "significantly affects" coastal zone resources or land or water uses.

The third step in the phased decisionmaking process is the approval of exploration plans. The Congress carefully reviewed the overall OCS administrative process and added section 307(c)(3)(B) to the CZMA in 1976. This section provides for certification of consistency for exploration plans, as this is the earliest stage in the overall process where a sufficient amount of specific information is available for a conclusive consistency test.

The fourth step of the process is the approval of development and production plans. Again, section 307(c)(3)(B) of the CZMA provides for State concurrence in a certification of consistency before any Federal permits may be granted. It is essential to recognize that throughout these steps no OCS oil and gas operations capable of affecting a coastal area may be approved unless they: (a) are found to be consistent by the State; (b) are conclusively presumed to be consistent because the State has not dissented within 6 months of submission of an OCS plan; or (c) are found by the Secretary of Commerce to meet a test related to objectives and purposes of the CZMA and/or national security objectives.

We would urge this Committee to fully review not just the history of conflicts under section 307(c)(1), but the history of approvals, accommodations, and denials under section 307(c)(3) as well. The OCSLAA and section 307(c)(3) of the CZMA provide an effective process for consultation among interested parties for resolving conflicting interests, for protecting coastal resources, and for developing OCS oil and gas resources. The States have generally found exploration and development and production plans to be consistent with their coastal programs. California is the only State where appeals to the Secretary of Commerce have been necessary to resolve issues related to approval of OCS exploration and/or development plans.

It is clear that these procedures have not eliminated all controversy. Nevertheless, we are committed to doing all we can to identify and employ innovative measures which would further reduce controversy whenever possible. The Department of the Interior is working with State authorities to address States' concerns to help assure that future OCS operations can be conducted harmoniously with State CZM programs. We are seeking to identify concerns early and to analyze them as a part of the decision process for each sale. Specifically, we have established procedures to:

(1) request comments at the Call for Information stage on issues related to possible CZMA section 307(c)(3) conflicts and consider these comments in the Area Identification process;

(2) make provisions in the environmental impact statement (EIS) scoping process for identification of CZM issues; each EIS does include an evaluation of possible CZMA section 307(c)(3) conflicts;

(3) analyze possible CZM conflicts in the Department's Secretarial Issue Document (SID) for the proposed Notice of Sale based on the final EIS (which would incorporate State and local comments on the draft EIS) and consultations with the State;

(4) explain to the Governor how State CZM program policies have been considered in decisionmaking and invite any further comment the State wishes to make. By letter, we ask the Governor for comments on the size, timing, and location of the sale. A copy of this letter is sent to the State CZM contact;

(5) incorporate State CZM agency comments and agreed upon measures for dealing with CZM concerns into the decision documents for the final Notice of Sale; and

(6) explain how State CZM concerns were handled in making decisions on the final Notice of Sale. This explanation will be part of the balancing letter required pursuant to section 19 of the OCSLA in response to the Governor's comments on the size, timing, or location of the proposed sale.

Department of the Interior consultations with affected coastal States early in each lease sale planning process have been effective in developing lease terms and conditions responsive to the States' concerns regarding the consistency of OCS operations with federally approved State CZM programs. These consultations frequently result in agreement by the Department to incorporate lease terms and conditions in the form of specific lease sale stipulations into the final Notice of Sale. We would particularly invite the Committee to consider the extensive provision of lease sale stipulations for Sale 73 and Sale 80 offshore California as examples of the measures Interior has developed pursuant to existing consultation procedures.

Established consultation procedures offer an opportunity to focus the prelease consistency discussion on the criteria for State consistency concurrence with future operational plans. These discussions will be especially pertinent to the exploratory phase of the process, which is the first point when actual coastal effects may occur. By helping to establish more certainty in the subsequent approval processes, these consultations contribute to meeting the primary goals of the OCSLA and the CZMA.

One of the reasons the Department of the Interior has argued against a determination of consistency for OCS prelease activities is that there is not sufficient information about specific effects of oil and gas exploration on the coastal zone at the time of the lease sale. There is no way to accurately judge which tracts will eventually be explored. Given the uncertainties in oil and gas exploration, the hypothetical scenarios initially developed for the EIS's and evaluated for consistency are not an effective means of fully evaluating protection measures for coastal zone resources. Such measures can be better developed when actual plans for exploration and development and production are submitted for evaluation pursuant to section 307(c)(3) of the CZMA.

S. 1412 WILL INCREASE CONFLICTS BETWEEN FEDERAL AGENCIES AND STATE CZM PROGRAMS

As previously stated, it is our opinion that the underlying reason for conflicts between Federal agencies and State CZM programs is that the mandatory and enforceable policies of those State programs are often vague and subject to varying interpretations. For example, with regard to OCS oil and gas activities, the following policies have been routinely used by the California Coastal Commission to review an applicant's OCS exploration or development plan for consistency:

Section 30200(b): "Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, section 3007.5 shall be utilized to resolve the conflict. . . ."

Section 3007.5: ". . . . in carrying out the provision of this division such conflicts [shall] be resolved in a manner which on balance is the most protective of significant coastal resources."

Section 30260: ". . . where new or expanded coastal dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible." [In fact, we have consistently aruged that this particular section is not even applicable to OCS activities]

Using these policies, California can deny almost any activity in order to be "most protective" or to permit the activity as having been "mitigated to the maximum extent feasible."

Through its section 312 review process, NOAA is now attempting to clarify the policies coastal states wish to enforce. Hopefully, given time and the concerted efforts of NOAA, these "mandatory and enforceable" policies will also be clear and predictable in their requirements. The consistency process simply will not work as it was intended unless state policies are clearly articulated and fairly applied.

However, passage of S. 1412 would subject a much broader range of activities to the consistency test and also require those activities to be fully consistent with State CZM policies at a time when NOAA is striving to bring clarity to State policies applicable to the range of activities currently required to undergo consistency determination. Without a doubt, the new requirements of S. 1412 would exacerbate the situation, instead of relieving it as the bill's sponsors intended. Having mentioned NOAA's section 312 review of the California Coastal Commission, I would like to clarify the Department's position on this effort. Contrary to some impressions, the Department of the Interior has not recommended decertification of the California program. We did submit a letter to NOAA dated May 29, 1987, which detailed a number of significant ways in which we felt the State was failing to adhere to and was deviating from its approved coastal program and the provisions of the CZMA. Our desire is that the Commission bring its program into compliance with the Act. Such an opportunity is provided under section 312 of the CZMA.

These are the terms of the statute indicating the scope of NOAA's oversight obligations. Appropriate actions specified for NOAA include options for withdrawing financial assistance or withdrawing program approval. The appropriate action, if any, is entirely a matter for NOAA determination.

The findings of NOAA, in its section 312 review of the program, confirmed most of our observations and revealed similar findings on a number of actions having nothing to do with OCS leasing; nor were they based on any comments of the Department of the Interior. While we have reviewed the Coastal Commission staff's response to the NOAA findings, we have not yet seen any substantive rebuttal of any of the examples of deviation which were identified in support of our concerns. We believe that compliance with the terms of the existing law is an important issue which must be addressed by careful review of the merits of the views of all interested parties. We support the current law and seek nothing more than NOAA action to assure compliance with the law.

THE NEW LANGUAGE DOES NOT NECESSARILY CLARIFY CZM

S. 1412 would amend section 307(c)(1) by requiring that federally conducted or supported activities generally be "fully consistent" with the State coastal management plan. The prior language required that activities be consistent "to the maximum extend practicable." The amended bill further provides for four limited exceptions to this authority. Establishing a full consistency standard would jettison that flexibility, and, despite the claim that it would recapture the original Congressional intent, would, in fact, be contrary to that intent.

The amendment raises two questions. The first question is whether this change of language is at odds with the original intent of the "maximum extent practicable" standard. The second question is whether the vesting of ultimate authority in the state, outside of the four narrow reservations alluded to, is contrary to the intended structure of the CZMA either on its own terms or in relation to the provisions of the OCSLA. We believe that the answer in each case is "yes".

It is important to note that only sections 307(c) (1) and (2) contain the "maximum extent practicable" standard. These sections apply to federally conducted or supported activities directly affecting the coastal zone and Federal projects in the coastal zone, respectively. Section 307(c)(3) provides for a "consistency" standard. This applies to applicants for Federal permits or licenses (under 307(c)(3)(A)), and to anyone who submits a plan for exploration, development, or production (under 307(c)(3)(B)). Thus, Congress applied the "maximum extent practicable" standard only to activities for which a federal agency was directly responsible. Congress applied an unqualified "consistency" standard only to non-Federal entities, and only with the additional proviso that the Secretary of Commerce have ultimate authority to determine whether the license, permit, or plan involved is consistent with the state program. Statements of the sponsors of this bill suggest that the intent of this change is to ensure that the state will have the final say as to whether the lease sale is consistent with the state plan.

The reason for applying the "maximum extent practicable" standard to Federal agencies may be found in the legislative history of the phrase. The "maximum extent practicable" language was itself a substitute for the requirement that the Federal activities be simply "consistent." Thus, Congress from the beginning considered and rejected the idea that full consistency be the applicable standard regarding federally conducted or supported activities. The reason for this rejection and substitution of the "maximum extent practicable" standard is expressed in House Report No. 92-1049, which accompanied H.R. 14146, the first bill in which the "maximum extent practicable" language appeared. In its discussion of section 307(c), the Committee on Merchant Marine and Fisheries first observed:

"Subsection (c) provides that once a State management program has been approved pursuant to the procedures set forth in the bill, it is expected that each Federal agency in conducting and supporting activities in the coastal zone will see that those activities are consistent with the program." [8]

The Committee then asserted: "There may, however, arise, after the approval of the program, some circumstances not foreseen at the time of its approval which may present a Federal agency with an obstacle or situation which as a practical matter may prevent complete adherence to the approved program. For that reason, the committee felt that some leeway should be written into the statute with respect to activities of Federal agencies in connecion [sic] with approved programs."

The Committee further noted that the same provisions applied equally to subsections 307(c)(1) and 307(c)(2). The Committee adopted the "maximum extent practicable" language from H.R. 14146. In its Conference Report, the Committee explained this adoption by saying only that they "agreed that as to Federal agencies involved in any activities directly affecting the State coastal zone and any Federal participation in development projects in the coastal zone, the Federal agencies must make certain that their activities are to the maximum extend practicable consistent with approved State management programs." [9]

This history strongly suggests that the Committee believed that the "maximum extent practicable" standard was necessary to allow Federal agencies flexibility in addressing the specific circumstances of a project.

The second question concerns the vesting of ultimate authority for consistency determinations. This question was addressed directly by the Ninth Circuit Court of Appeals in *California* v. *Watt*, 683 F.2nd 1253 (1982), where the court reviewed proposed Lease Sale 53 offshore California.

The court first considered the "maximum extent practicable" standard. The court determined that Congress had not made clear where ultimate authority would lie, and absent and express delegation of authority to the states, the "maximum extent practicable" standard must be interpreted to mean that the final authority to determine consistency must lie with the Executive Branch, subject to judicial review. The court reasoned that "[t]o hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of Congress, weighs too lightly the interests of the Nation against that of a state."

The court next considered this conclusion in light of other provisions of the CZMA. The court concluded that under section 307(c)(3): "The Secretary of Commerce is given the final say as to whether the activity is consistent with the objectives of the CZMA, and if not, whether it is otherwise necessary in the interest of national security. It would be anomalous for Congress to have provided the state with final authority unilaterally to nip these activities in the bud, by reason of the application of section 307(c)(1) to lease sales, in the face of its careful scheme in section 307(c)(3) to assure that a state cannot unilaterally stop the activity at later stages. We do not think it intended to so provide."

Finally, the court considered the relationship of the CZMA with the OCSLA. The court first noted the control over OCS submerged lands granted to the Federal Government by the OCSLA. The court then noted section 307(e) of the CZMA, which provides that "[n]othing in the title shall be construed (1) to diminish either Federal or state jurisdicition, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters." The court concluded that "[g]ranting final veto power to coastal states would thwart the purposes of the OCSLA."

---

[8] H. Rep. No. 92-1049, 94th Cong., 2d Sess. (1972), reprinted in Committee Print, Legislative History of the Coastal Zone Management Act of 1972, as amended in 1974 and 1976 with a Section-by-Section Index, 94th Cong., 2d Sess. 305, 323 (1976) [hereafter "Legislative History"].

[9] H. Conf. Rep. No. 1544, 92d Cong., 2d Sess. (1972); Legislative History at 443, 457.

Thus, under this decision of the Ninth Circuit, regardless of the language used, the intent of the proposed amendment runs afoul of the language and structure of the CZMA, and the interrelationship of the CZMA with the OCSLA. Furthermore, the proposed amendments will inevitably lead to further litigation and increases uncertainty for all parties.

The effort to require full consistency of Federal activities with a given state's coastal management plan is almost certain to conflict with the Federal obligation to other coastal states under section 19 of the OCSLA. Under section 19, the Secretary of the Interior is required to accede to any state governor's recommendation as to OCS oil and gas activities, if that recommendation reasonably balances the national interest with the "well-being of the citizens of the affected State."

To illustrate the potential for conflict, consider a proposed lease sale in the North Atlantic. Suppose that the Governor of Rhode Island recommends that the sale be held precisely as set forth in the Proposed Notice of Sale. Under section 19, the Secretary, having determined that this recommendation properly balances the national interest with the well-being of the citizens of Rhode Island, would be required to hold the sale as planned. Suppose further that the sale would be inconsistent with the coastal management plan of the Commonwealth of Massachusetts, as determined by that state under the amended CZMA. Arguably, under S. 1412, the Secretary would be at an impass, unable to comply simultaneously with the wishes of both States, and with no discretion under the CZMA to comply with his legal obligations under Section 19 of the OCSLA.

The conflicts posited here seem to us inevitable and irreconcilable. Thus, we believe that far from helping to resolve any existing Federal/state conflicts, the proposed bill would add additional interstate conflicts.

In summary, Mr. Chairman, the Department must oppose this legislation since it is unnecessary and goes far beyond the original intent of Congress when it enacted the CZMA in 1972. The Department continues to believe that the CZMA has served a useful and important function in coastal resource management and supports that law as it is currently written. However, the Act was carefully crafted to preserve the balance in the federal/state relationship and we believe S. 1412 could disrupt that balance.

We now have fifteen years experience with the CZMA and we have begun to reach a clearer understanding of both the State and Federal roles under the Act through a process of patience, practice, and litigation. Now is not the time to sidetrack this maturation process.

This concludes my prepared remarks. I would be happy to answer any questions you may have.

Senator KERRY. Well, we would be delighted to have that. I am sure that in the course of the colloquy here we will get some opportunity to do that. And where you feel that we haven't adequately been able to do that because of time, we would certainly welcome your comments. We are trying to, obviously, build a record that does address each issue, and I am sure that subsequent panels will want to address some of your comments.

As I listened to the three of you, I guess I am sort of left saying what the heck are we doing here. Everything seems to be working fine. The process is terrific. There is no cause for concern. And yet, the record belies that. I don't know whether you want to avoid that reality or you are not aware of that reality or you disagree with that reality, or all three of the above. I mean, there are several different areas where I think that is true. Let me begin at the beginning.

You say that changing "directly affecting" to the term "significantly affecting" is going to confuse the administration of consistency review. Well, is it your contention that there is no confusion in the administration of consistency review today? Let me just get quick answers, if I can. Do you think there is confusion today? Mr. Tweedt, what do you think?

Mr. **Tweedt**. Senator, I don't think there is—no, not in the consistency procedure that is provided in the act dealing with both exploration permits and development permits. And incidentally, I think that is one of the few activities that is specified in the act. The others are covered under a broad term. The act directly refers to both the Department of Interior permits and OCS activities. And I don't think there is confusion in the consistency process in dealing with either exploration permits or development permits.

Senator **Kerry**. Well, let me be more precise then. Department of Justice has argued in direct violation of NOAA regulations that the Government Services Administration surplus property disposal action is exempt from consistency review. That is confusion. Justice says one thing; NOAA says another.

The Army Corps of Engineers proposed regulations regarding dredge and fill projects suggest that activities outside the coastal zone are not subject to consistency. That is pretty confusing to some people.

You combine those facts with the Justice Department's position in the Lake Gaston case, *North Carolina* v. *Hudson*, which limits review under section 307(c)(1) and section 307(c)(3). Those are three examples.

Now, it seems to me that some kind of legislative clarification is needed to make it clear who is supposed to be doing what, and what is inside and what is outside, and where it applies and where it doesn't. Do you want to comment on that?

Mr. **Hookano**. Senator, may I respond?

Senator **Kerry**. Sure.

Mr. **Hookano**. I think those cases represent very unusual fact situations.

I think one case involving a transfer of property that might be useful to refer to is the case of *Ono* v. *Harper*, which comes out of the District Court, District of Hawaii. In that case the issue was whether or not there had to be a consistency review for a sale of property wherein the land use was not going to be changed or affected. The District Court held in that case that this sale and purchase of property was something that was environmentally neutral and so, therefore, it could have no direct effect on the coastal resources, and therefore held that a consistency review was not appropriate.

So, I think that the decision in *Ono* is entirely consistent with the statute which talks in terms of an activity directly affecting coastal resources. Where the activity is merely a paper transaction involving a transfer of title to property, that activity has no direct impact on coastal resources. And therefore, a consistency review would not be required under the statute.

With regard to the——

Senator **Kerry**. Can I interrupt you there for one minute?

Mr. **Hookano**. Yes, please.

Senator **Kerry**. It is all well and good for you as one attorney to say that here is a narrow interpretation. And that is what you are giving us. And you have a right to do that. And that may be your reading of the case.

But I have a letter in my hand written to Joan Bondareff, Assistant General Counsel of the Ocean Services, from Assistant General Counsel of the Disposal Division, Albert Vicchiolla—I think I pronounced it right—who says that the General Services Administration wishes to set forth its views on 15 CFR subpart C of the National Oceanic and Atmospheric Administration regulations on Federal activities in the Coastal Zone Management Act. And in that letter, citing the very case I just talked about, they use it as a foundation for talking about whether or not real property sales affect the coastal zone and so forth. So, that is pretty confusing. I mean, that is a dichotomy, to say the least, between agencies.

Mr. HOOKANO. The thing that we should——

Senator KERRY. I am going to put this into the record so that the letter is printed in full as part of the record.

[The letter follows:]

GENERAL SERVICES ADMINISTRATION,
April 15, 1985.

JOAN BONDAREFF, Esq.,
Assistant General Counsel, Ocean Services, Washington, DC.

DEAR MS. BONDAREFF: The General Services Administration (GSA) wishes to set forth its views on 15 CFR Subpart C, the National Oceanic and Atmospheric Administration regulations on Federal activities and the Coastal Zone Management Act (CZMA). Section 930.31 includes in the definition of a Federal development project, disposals of land resources. This section has a major impact on the operations of the Federal Property Resources Service (FPRS) real property disposal program. In the case of each disposal of Federal surplus real property, Section 930.31 of the regulation would require FPRS to determine whether the disposal directly affects the coastal zone.

The U.S. District Court for Hawaii rejected the argument that the sale of Federal real property directly affected the coastal zone in *Ono* v. *Harper*, Civil No. 82-0766 (1983), an unpublished opinion. This issue was one of first impression and the resulting opinion is indicative of the position of the Court. The court determined that the mere transfer of title to property situated in the coastal zone did not "directly affect" the coastal zone. The Court noted that, in its view, a transfer of title did not change the way in which the land was being utilized. Further, the Court said, the Government, in selling the land, made no representations that the buyer would take the land free of the restrictions placed on it by the state, city, or county. This reasoning will be proffered by GSA to other courts when debating the same issue.

The Supreme Court case of *Secretary of the Interior* v. *California* —— U.S. ——, 104 S.Ct. 656 (1984), offers some insight into whether real property sales affect the coastal zone. This case concluded that an oil and gas lease sale was not within the CZMA as it did not directly affect the coastal zone. Such sales were viewed as most closely resembling federally approved activities of a third party (Section 307(c)(3) activities) because the Federal agency selling the lease approves any resulting activities. Like lease sales, a real property sale is an activity most applicable to Section 307(c) (3). However, this subsection concerns licenses and permits which are not appropriate for real property disposals. Sections 307(c) (1) and (2) concern activities conducted or supported by a Federal agency and development projects undertaken by a Federal agency, respectively. The Supreme Court said these two sections only apply when a Federal agency is itself the principal actor in the resulting activity. That is not the case in GSA real property disposals. The real property disposal program does not undertake development projects on surplus property. Any development projects would be undertaken by the purchaser, not the seller, and it would entail more than a mere acquisition of title. Nor does GSA control the disposition of the land once sold. As such GSA does not conduct or support any activity on the transferred property. It is clear that the Government is not the principal actor controlling land use.

There is a valid policy reason for excluding the sale of surplus Federal real property from the definition of a Federal development project in the regulation. The coastal zone is protected from adverse effects during both the tenure of Federal and private land ownership. While the United States Government holds title to its land, Federal agencies are subject to CZMA prescriptions against land usage which directly affect the coastal zone. Once title is transferred to a private purchaser the State coastal management plan governs land usage. The safety of the coastal zone control area is protected during each party's term of ownership and the act of transferring title to the land does not affect the application of these laws.

For these reasons reference to real property disposals should not be included in the regulations and we are advising our offices not to comply with this section of the regulation. We request that your office remove such references from the regulation.

Sincerely,

ALBERT A. VICCHIOLLA,
Assistant General Counsel, Disposal Division.

Mr. HOOKANO. Senator, I am not familiar with that letter, but I would like an opportunity to respond to that.

Senator KERRY. No, but the people who got it are as familiar with it as we are. The point I am making is that we need some clarification with respect to this.

Mr. HOOKANO. I think that the statute is clear, Senator, in that it says "activities directly affecting coastal resources." Our view is that a pure paper transaction which is environmentally neutral is not the type of activity for which you intended to have consistency review take place.

But let's say that the transaction would involve a change of land use or there were some conditions in the sale contract which would provide limitations on the use of the property that could have an impact on coastal resources, then that would come within the ambit of the statute and a consistency review may be required.

I think one thing to keep in mind is that the General Services Administration is involved in numerous transactions on a regular basis through its various mortgage programs. And the question would be whether or not this committee, or indeed the Senate, would want to extend the legislation so broadly that all of those transactions would come under a consistency review.

I think an example of that that might be of interest to the Senator comes from the State of Massachusetts.

Senator KERRY. Before you go too much further with that, let me ask you this. Is it your contention that the original act, in fact, contemplated exclusion? Or is this a subsequent——

Mr. HOOKANO. That the original act contemplated exclusion.

Senator KERRY. Exclusion of those sales from consistency review.

Mr. HOOKANO. I think that is correct. Yes, Senator, I do.

Senator KERRY. All right.

Let me come back, if I can, to the general theme of where we are and why we are here. And Mr. Tweedt, I would like to ask you about it, if I can.

Again, in your comments you consistently said that you felt things were working, and that the process afforded a balance. I have heard the term "balance' several times here, et cetera. You also said that you support the goals of the Coastal Zone Management Act and its consistency provisions.

Yet, the Office of Ocean and Resource Management has engaged in a persistent practice of writing letters to States, criticizing their use of the consistency authority, stating your views that their objections are invalid. You signed off on various Justice briefs that construe the States' authority narrowly, specifically the case we referred to, *North Carolina* v. *Hudson*, and *Exxon* v. *Fisher*, which says they can't use it to impose conditions on EPA's permit for ocean incineration, et cetera.

You haven't sent any comments to the Army Corps of Engineers objecting to their proposed regulations that take the position that none of their dredge spoil disposal activities outside of the coastal zone are subject to consistency. You have never commented to the General Services Administration regarding the surplus property issue that we have just talked about where I have asserted there is confusion.

How do you square those with the notion that it is really working smoothly and perfectly and everybody has an understanding under the current language?

Mr. TWEEDT. Senator, I believe the first example you cited was correspondence to the State program CZMA agencies on their specific consistency actions.

In this calendar year so far, January through August, we have had—and the States do, as part of a practice, send us consistency determinations on every permit or every Federal agency action that they do a consistency action on—and in this past nine months, we have received about 110 of those from all the States. I think we have commented on about 10 with regard to technical or procedural matters which need correction. We have not been second-guessing their consistency determinations. We have been commenting on procedure.

I am trying to answer several of your questions, as I can remember them.

Senator KERRY. Well, I threw several examples out. I mean, the real question is not to address each of the individual examples. I think the real question is getting at the sense that there is something wrong. Perhaps our language needs refining.

I am troubled by your feeling that everything is fine in the state of Denmark, and that there is nothing that needs refinement here because I think the record really stands to the contrary. And that is what I am asking you. I suppose what you are saying to me is that you just disagree with those observations. Is that correct?

Mr. TWEEDT. Yes, Senator. I believe that the combination of acts—and we started out talking about OCS activities—I believe that the OCS Lands Act, section 19, and the one example I cited—and I am sure Mr. Bettenberg could cite many more—I think that that combination, the presale activity with section 19—and, once the sale has been conducted, the two shot permit activity that comes under the CZMA, works well.

Mr. BETTENBERG. Mr. Chairman, if I could supplement that answer a little bit.

The things that you cite I think are some of the things that we have been concerned about in the Minerals Management Service, and that is, as in all Federal programs that give grants of Federal authority, and require oversight, that that oversight be exercised in a vigorous manner.

For that reason we wrote NOAA to indicate that we had substantial concerns with the pattern of practices of the California Coastal Commission. It wasn't a concern with the exercise of the law or with what the law says. It wasn't a concern specifically addressed to the plan of the State of California, but it was a concern on how they were carrying it out.

If you were looking at a different program, such as the Environmental Protection Agency overseeing State programs under the Clean Air Act and found them to be less than diligent, I think you would appropriately be critical of their administrative behavior.

And we feel that the same thing is taking place with regard to the coastal zone management program. It is specifically that NOAA oversee the exercise of those State programs and assure that they are operated to comport with Federal law.

Senator KERRY. Well, let me get more specific with you.

Governor Dukakis, under section 19, which you cited and said works so effectively, and also said that the States have adequate opportunity for redress, specifically requested that critical areas be deleted from the 1982 sale on the Georges Bank. The Interior Department refused, which incidentally is what happens to most of the requests under those various balancing tests you talked about. I mean, it may balance, but it is pretty clear which way the balance tilts once the process is over. And the refusal was clear. And in the refusal it said, no, there are "high oil interests"—I am quoting that—"high oil interests" which govern this decision.

Now, what is a State supposed to feel then with respect to its coastal zone management plan and the section 19 process?

Mr. BETTENBERG. Let me start with the latter part of your question first.

In terms of its coastal zone management process, when the State of Massachusetts was confronted with specific development plans from a number of companies to drill on Georges Bank, they specifically looked at their coastal zone management plan and found that the drilling of all 176 proposed wells submitted in those programs was consistent with their State coastal zone management program.

So, the Governor wasn't addressing his coastal zone management program when he was asking for the deletion of acreage. His responses were part of the section 19 process and he was responding, you might almost say, out of whole cloth, not in relation to the coastal zone management plan itself. There is nothing in the Massachusetts coastal zone management plan that would prohibit leasing or those particular development wells on Georges Bank.

Now, the Governor has taken the position—it has varied from sale to sale, but most recently a position—that leasing off the State of Massachusetts is fine so long as it is at a water depth greater than 400 meters. However, he knows perfectly well that no one in the world has ever developed oil or gas in water depths of 400 meters. And so, it is a fairly safe position for him to take.

Senator KERRY. Well, the bottom line is that it excludes oil on the Georges Bank. Correct?

Mr. BETTENBERG. Well, it excludes oil on Georges Bank and far beyond Georges Bank.

Senator KERRY. But he is addressing it with respect to the concerns of the Georges Bank in Massachusetts.

Mr. BETTENBERG. What he has requested be deleted both from the 5-year program and from individual lease sales goes far beyond what Congress has placed in moratorium through the appropriations from FY 1984 to the present. Congress has addressed Georges Bank. He has gone beyond that.

Senator KERRY. Well, agreed. We have addressed Georges Bank, and each time—we have addressed it 5 years running. Correct? And we have addressed it again this year in the appropriations bill and notwithstanding 5 years of our addressing it. And notwithstanding our putting it in the appropriations bill this year, you have gone ahead and recommended that certain tracts included in that moratorium over those 5 years and this year——

Mr. BETTENBERG. Yes. Some of the moratorium zone is in the 5-year program, and some is out. The reason for this action is that we assume that when Congress enacts a piece of legislation for a 1 year timeframe, they intend it to apply for 1 year and 1 year only.

Senator KERRY. Why does Interior continue to do that notwithstanding Congress' 5 year expressed wish and intention to do it this year?

Mr. BETTENBERG. Let me give you several parts to an answer.

The first is that we assume that when Congress enacts a piece of legislation for 1 year, they intend it to last 1 year. And that is the form that these moratoria have taken.

The second is that the OCS Lands Act doesn't ask us to weigh one congressional vote against another. It asks us to weigh substantive concerns. And we have looked at those substantive concerns.

We find a part of the Georges Bank has little oil potential and we don't see much potential for environmental damage there, but a little oil potential. So, we have taken part of that out of the five year program.

We have responded to the State of Maine by taking the entire Gulf of Maine out of the program because we weighed their concerns against the national concerns.

We looked at other parts of Georges Bank. Those are parts where drilling for oil and gas has already occurred in some cases with——

Senator KERRY. I have never heard anyone assert that there was oil off the coast of Maine. It's pretty easy to take it out. Has anybody ever asserted there was oil off the coast of Maine?

Mr. BETTENBERG. There is probably some slight potential there, but we would think little.

Senator KERRY. Yes.

Senator STEVENS. There is oil off Newfoundland, oil off Canada north of Maine.

Senator KERRY. But not off the coast of Maine, not specifically in the areas that he quotes that they have excluded. In each of those excluded areas to the best of my knowledge there has never been an assertion of the presence of oil. So, it is very easy to exclude the excludable.

Mr. BETTENBERG. I only cited one. There are others that have higher potential for oil that have been excluded.

In Georges Bank, the part that is in the 5-year program we look at from the standpoint of it being an extremely stable bottom, essentially flat, shallow, an extremely good platform in effect for exploration and development. We know that there are high commercial fishing values in that area. We have a track record that shows that we can accommodate the commercial fishing that is there.

We have a very strong belief that oil is not likely to be found in the North Atlantic. What you are likely to find is natural gas. If you were to find commercial quantities of natural gas in the North Atlantic, it could be the equivalent of a 10- to 30-year supply of natural gas for Massachusetts. We don't think that there is a high hazard from spills of natural gas.

And therefore, we balance those things and conclude that the substantive case for leasing is very solid and the substantive case against it hasn't been made.

Senator KERRY. Well, I am not going to debate with you. I guess we just disagree on that particular area and that is not the purpose of this hearing. And I don't want to get into an argument about whether or not there is or isn't oil or the balancing of those equities.

The real question here is process. And the real question is whether the law is clear and whether it adequately accomplishes the goals of the original act. And I think that is really what we are trying to get at.

Now, in talking about process—let me just ask you—with respect to the 5-year plan. I know my friend over here has been very patient. I have taken more than my 10 minutes, and I will end very quickly and give him his turn.

But in preparing the five year plan, did you consult the Massachusetts Coastal Zone Management Office?

Mr. BETTENBERG. I would have to go back and check the record. We consulted the State, the Governor specifically. My recollection is that the person who works closely with us in the entire process and is the alternate delegate to our advisory committee and usually is there, in fact is in that particular office.

Senator KERRY. But you have no specific recollection of consulting with them.

Mr. BETTENBERG. We consulted the State government. That involved——

Senator KERRY. Well, I'm asking whether you specifically consulted with the office.

Mr. BETTENBERG. I think that the answer to that is yes, but I would have to go back and check the record to make sure.

Senator KERRY. Do you know what you did with the information they gave you?

Mr. BETTENBERG. Yes. Specifically we considered it.

Senator KERRY. How do you know that if you don't know if you consulted them?

Mr. BETTENBERG. We know that the information we were given by the State of Massachusetts was considered.

Senator KERRY. But you don't know whether or not you considered the information given to you by the office.

Mr. BETTENBERG. If the office gave us information, it was considered.

Senator KERRY. Well, I would appreciate it if——

Mr. BETTENBERG. But I think that it came——

Senator KERRY. Do you have a record of whether or not you did consult with them?

Mr. BETTENBERG. We should have that record, yes.

[The following information was subsequently received for the record:]

SUMMARY OF CONSULTATION WITH THE MASSACHUSETTS CZM OFFICE DURING DEVELOPMENT OF THE 5-YEAR PROGRAM

Consultation with affected States regarding the 5-year program was initiated by a letter from the Secretary dated July 5, 1984, which requested comments and suggestions on the development of a new 5-year program. That letter was sent to the Governor of each coastal State, including Massachusetts, and specifically requested information concerning relevant State laws, goals, and policies and CZM issues that might be pertinent at the program planning stage. The Governor responded with a letter dated August 24, 1984, which was considered in the preparation of the 5-year program.

During development of the 5-year program, comments were solicited formally in the Federal Register when the Draft Proposed Program was issued on March 22, 1985, and again when the proposed program was issued on February 7, 1986. The Governor of Massachusetts responded with letters dated May 17, 1985 and May 7, 1986, which also were considered in the preparation of the 5-year program.

As part of the consultation process, public hearings were held on the Draft Environmental Impact Statement (DEIS) that was prepared for the 5-year program. Massachusetts' OCS Coordinator, a representative of the State's CZM Office, presented testimony at one of those hearings which was held on April 15, 1986. That testimony, which addressed both the DEIS and the analysis contained in the Secretarial Issue Document for the program, was considered along with the testimony and comments of others in the preparation of the last phase of the 5-year program.

The Massachusetts OCS Coordinator also is a member of the OCS Policy Committee and Regional Technical Working Group, which provided important fora for consultation between the Department and affected States. Meetings involving those bodies addressed various aspects of the OCS program and specifically discussed the development and decision process for the 5-year program. Information presented at those meetings by the Massachusetts OCS coordinator and others was helpful in the preparation of the 5-year program.

Senator KERRY. I do have some other questions, but let me turn to my friend from Alaska who has been very, very patient.

Senator STEVENS. Thank you, Mr. Chairman. I have got some specific questions.

As I listen to this dialogue as one who helped write that first law, I am constrained to say I think it is clear. The problem is many people don't like the results that are coming from it.

You mentioned, Mr. Bettenberg, the negotiations with States. I remember so well the negotiations we had over Bristol Bay. We wanted no leasing in Bristol Bay and we achieved no leasing in Bristol Bay. We moved it out 100 miles from Bristol Bay, put it on the North Aleutian shelf. And the same people who opposed leasing Bristol Bay then opposed the North Aleutian shelf. I think the act was clear, and we proceeded under the act.

Mr. Chairman, my specific questions are for the record now, and I am sure these gentlemen will respond to them.

I have been on committees where we tried to get oil shale going, and that was opposed. We have had the problems of nuclear development. That has totally been opposed. We have the question of opening up new coal lands. Even in my State, that is opposed. We have had the question of proceeding on shore, particularly in Alaska. You have just come back from the ANWR area. That is opposed. We now look to off-shore development. That's opposed.

As a matter of fact, in one case, in connection with the Alaska oil pipeline and the attempt to block that, we found that the brief that was filed in Louisiana by people who opposed the developments in Alaska said that Louisiana OCS should not be leased because there was an alternative in Alaska. When we looked at the Alaska brief, the same people filing the brief said that Alaska development should not proceed because there was an alternative in Louisiana.

When we are talking about consistency, I think really the question is we ought to look at how long can those who oppose development use Federal laws to prevent development.

And from my point, I think this act is clear, and I intend to support it as it is. But I do believe—and that's what I want to get to. I do believe that the question really is whether or not there is enough consistency in the State plans themselves. Why should we not have a bill—if my friends oppose the concept of using the 200 mile limit model as a way to solve this dispute between the States and the Federal Government, why should we not produce a model coastal zone plan for States? Have any of you ever considered that?

We have model plans and statutes in the judicial area, in all the problems of enforcement of laws. Why shouldn't there be a model coastal zone management plan which allows some variation in the application of it, but everybody knows what the relationship would be between the States, the Federal Government, the communities, the environmentalists, the developers so that we set some national ground rules for dealing with each of these areas that you are talking about, and defines the role of who is going—how the Corps of Engineers, how the GSA, how all the echelons of the Federal Government are going to relate to that model plan? Why shouldn't we try to do that?

Any of you want to answer?

Mr. **Bettenberg**. Senator, let me venture a start on an answer. The act itself does establish some criteria. Your suggestion may well have a lot of merit when you look at the actual plans.

Let me read to you what the New York plan says about the Outer Continental Shelf, for instance. It's the policy of New York under its coastal zone management plan to "encourage the development of energy resources on the outer continental shelf, in Lake Erie and in other water bodies and insure the environmental safety of such activities." That's the entire text of the plan as it relates to the Outer Continental Shelf.

Now, I defy anybody to conclude how the officials administering that will come down on what that precisely means with regard to any specific lease sale, a development plan, a platform and so forth. When you look at the individual plans, you find in fact that they are very heavily dependent upon the people who are at that time administering them.

And that is one of the things that we have been concerned about, one of the things that the OCRM office has been concerned about. And the OCRM office has been taking a more vigorous role in reviewing plans to assure that they do provide some definite guidance and that they are consistent with the guidelines that are in the act. We think that that is very important.

Mr. **Hookano**. Senator, may I comment?

Senator **Stevens**. Yes, Mr. Hookano.

Mr. **Hookano**. It would seem to me that if this legislation were to go forward that, indeed, some consideration should be given to a model coastal plan.

And I make that comment because of the language "significantly affecting" in the proposed legislation. That language is, indeed, extremely ambiguous. And I could envision a situation where we would have all the coastal States with coastal plans defining that term differently.

The question would be then how the Federal Government or other States would relate to that language. It would seem to me that enactment of this legislation would lead to more uncertainty, to more inconsistency and, indeed, to much litigation with regard to what that term means.

Senator **Stevens**. Well, I agree. I think that is the great problem. This is supposed to clear up the current confusion that exists, but the bill itself has so much interpretive language that it will lead to more litigation than the existing law.

It seems to me what we need is more specifics in the law, defining the relationships of the States, the industries, the environmental groups and, indeed, the courts themselves respect to this property, which is Federal land.

You know, I come from a State that has half of the Federal land that is on shore. And we are constantly told we are immaterial. We have nothing to say about what goes on—Federal land within the State. And here are all these coastal States that want a veto of what goes on on Federal land that is outside their States.

Somehow or other we have to find a way to get consistent in terms of dealing with Federal land, period. We would like to have a little bit more to say about what goes on on Federal land within our State.

But it does seem to me that the question of the differences between these States and the way they treat it—I am appalled that the State of California can reach a conclusion—its commission did—saying it is going to oppose all Federal lease sales in the outer continental shelf for the next 5 years. And the same group sends to Congress Congressmen and Senators that oppose our leasing, our developing Federal lands within our States. I think that somehow or other we have to develop a national policy with regard to energy potential on Federal lands and set down the criteria how the States and local agencies will be heard and who is going to make the decisions, and then go forward in the interest of national security in this country. One of these days it is going to be very interesting in California to see all those cars parked because they can't get energy.

And my friend, I grew up in California. My family still has property along the beach. And I remember when I was a youngster that the chief thing in my life was the can of cleaning solvent that was outside the door to take the tar off our feet. We have had a problem in California with off-shore activities, and will continue to have it. And you had it in Hawaii.

And the question is it's common sense. Instead of having this business, I think the Times article demonstrates what happens when we give veto powers to States that pass them on to local governments and all we get is even more litigation, litigation on the local level, litigation on the State level, litigation on the Federal level. And as a consequence, I don't think we have had a major offshore discovery in the last 5 years. Have we?

Mr. **Bettenberg**. Some in the Gulf of Mexico.

Senator **Stevens**. Any new discoveries?

Mr. **Bettenberg**. I don't recall any new discoveries in deeper water in the last 5 years off shore California of any significance.

If I could heighten your concern, Senator, if that is at all possible——

The language that is proposed in this legislation is more sweeping than perhaps you visualize. You might have heard the Chairman—or I guess it was Mr. Panetta—talk about areas that were "seaward" or "landward" of the coastal zone. As we understand that language, it might well affect Federal activities in Alaska to the extent that the California Coastal Commission could also be attempting to veto those activities. If you visualize landward, it extends to the center of the United States and so, you can visualize that a Federal project in Kansas might be stopped because the State of Louisiana thought that it adversely impacted, or at least was inconsistent with, the State's coastal zone program in Louisiana. And if you visualize seaward, that goes all the way past Japan, and it certainly goes to Alaska. And so you could have the State of California and their Coastal Commission taking positions on issues that you thought were Alaskan, as indeed the Governor of Washington once did with regard to North Aleutian and the sale there.

Senator **Stevens**. I am constrained to say I think one of the mistakes of the original act was we confined our consistency to the coastal States. I should think that the people of Illinois and Nebraska and some of the Midwest States that were denied Alaskan oil should have had a say in whether or not Long Beach could block the use of the El Paso pipeline for Alaska oil because, as I said, it raised the price of their oil considerably. And as a matter of fact, many of those refineries went out of business.

I would like to ask one thing of each of you and that is, would you cooperate in trying to develop a model coastal zone management plan that we might offer to put in this legislation? Is that something that would be within—or maybe you better answer that for the record, confer with your people in each of your agencies to see. I am of the opinion that what we should try to do is amend this to have a model coastal zone management plan that contains specifics, that does not deal with the words that will have to be interpreted by courts diversely throughout the country, and see if we can solve some of this current confusion and our dilemma by being more specific about what we intended originally and not changing the concept that we originally set out in existing law. Would you answer that for the record for me please?

Mr. **Bettenberg**. Surely.[1]

Senator **Stevens**. Thank you, Mr. Chairman. I am sorry to tell you that I must go and introduce some people at a meeting.

Senator **Kerry**. I appreciate your participation. I did want to comment on a couple of things you had said. I am going to do it for the record. There is no reason you have to be here.

Senator **Stevens**. I'll be happy to stay.

---

[1] At press time Jan. 20, 1988 the material requested had not been received by the Committee

Senator KERRY. Well, it seems to me that with respect to the concern that you have expressed, and that has been expressed by our panel regarding the potential for litigation, we already have that. And we have that because in fact the word "directly affecting" has not been subject to judicial definition over the years. And I think Mr. Hookano certainly knows that the term "significantly affected" has a 17 year record under NEPA of interpretation. It is currently used in NEPA, and it is extensively defined in case law, as well as the Council of Environmental Quality Regulations that implement NEPA. So, there is a distinction between "directly affecting" and "significantly affecting" which I think would reduce litigation, not encourage it.

Mr. HOOKANO. Senator, may I comment?

Senator KERRY. Sure.

Mr. HOOKANO. There is definitely a distinction between the two terms, but the question is whether or not this term "significantly affecting" is any more precise.

You refer to the CEQ regulations defining the term "significantly affecting." What that guideline does is include impacts that go far beyond economic and environmental concerns. Indeed, the CEQ regulations which are referred to include impacts such as aesthetic impacts, historic impacts, cultural impacts, economic impacts and social impacts. The question is whether or not you want to use that term and expand this legislation to cover those impacts because they could be entirely unrelated to the protection of coastal resources.

Senator KERRY. Let me come back. If you read further in the bill, that is taken care of because included is the phrase "natural resources or land or water used in coastal zone," which clarifies where the Congress is focusing in terms of narrowing the impacts that affect only certain things.

But let's not argue about it now. I think if you want to further elucidate that, you can.

I think it is important, though, to point out here that there is no blanket opposition to off-shore drilling that is being manifested here.

And I just disagree, Mr. Bettenberg, with your notion that somehow this gives Oklahoma or Nebraska or some internal State the ability, even hypothetically, or a local government, as Senator Stevens was saying, the ability to be able to veto. It's just not there. That is not the process. The process is one where the Federal Government provides the information for the consistency review, solicits the information, dissects the information, analyzes it and comes up with a conclusion. And the States have no determinative power under the current law or under the new law, whatsoever.

The States have only two recourses, as you well know. They can mediate, or they can seek judicial intervention with a restraint against the Federal Government's actions. And nothing has changed here.

What we are talking about is a process by which we make judgments, whether or not something will be subject to review or not. That's all. It's not a big deal. And you are saying that they are somehow going to have a veto power when, in fact, no such determination of power exists whatsoever today, nor will it be created under this bill. And I think that is the kind of red herring argument that just consumes too much time, energy and effort in the course of trying to resolve this process.

Now, we have taken longer with this panel than we really meant to or have time for. I would welcome, if you want to submit some contrary indications for the record to that in writing—I'm sure you may want to do that.

And then one final comment. Again, there is no conspiracy here to prevent adequate ability to serve the long-term energy needs of this country. If indeed there is oil in deeper areas or in other areas where it may be, I am sure that people will figure out how to do that. But that is not what the Georges Bank is all about. And some scientists even tell me that if there is oil on the Georges Bank, which is dubious, it is in deeper sections, and there are some questions about the technology for getting it out. However, they feel this is not so in the shallow sections. Now, that remains to be seen.

At any rate there are enough questions, and the balancing appears to some observers to be enough in question, that trying to clarify the review process is all that this bill is about. And I would like to move on to hear, if I may, from the third panel before the second panel. I want to reverse that order.

And I thank you all very, very much for appearing. Your comments have been helpful. There are obviously many areas yet to proceed on, and we will do that in subsequent questions.

Would Mr. Ghylin please come to the table?

Mr. Ghylin, I would ask if you could, again, summarize your testimony. But we will try to give you adequate time if we can.

STATEMENT OF CLAIR GHYLIN, MANAGER OF LAND, WESTERN REGION, EXPLORATION AND PRODUCTION, CHEVRON CORP. ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE AND THE WESTERN OIL AND GAS ASSOCIATION, ACCOMPANIED BY E. EDWARD BRUCE, COUNSEL; AND PAUL L. KELLY, VICE PRESIDENT, ROWAN COMPANIES, INC., ON BEHALF OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION

Mr. GHYLIN. Mr. Chairman, members of the committee, I am Clair Ghylin, Manager of Land for the Western Region for Chevron. I am appearing today on behalf of the American Petroleum Institute and the Western Oil and Gas Association, the petroleum industry trade associations that represent over 200 companies and 500 individuals engaged in all aspects of the petroleum industry.

With me today is Mr. E. Edward Bruce of the law firm of Covington & Burling, and I ask that the written statements of Mr. Bruce and myself be admitted into the record.

Senator KERRY. Without objection, it's so ordered.

Mr. GHYLIN. I would summarize those statements, and then following my statements, I would like to introduce Mr. Paul Kelly, Vice President of Rowan Companies.

The petroleum industry endorses the basic objective of the Coastal Zone Management Act to achieve a balance between resource protection and orderly coastal development. Unfortunately, we believe that not all of the States enjoying the benefits of the financial aid created by CZMA have achieved that kind of a balance in their programs. Instead, the law has been implemented by some States in a way that not only frustrates the orderly use and development of the coastal zone, but runs counter to the clear national objective of reducing dependence on imported energy by expeditiously developing the off-shore.

In addition, API and WOGA are disappointed with NOAA's oversight of State coastal plans and their implementation. In our view NOAA's failure to insist on the promulgation and implementation of clear State policies and programs has led to confusion and, in the case of some States, the exercise of authority far greater than we believe was contemplated by the initial Coastal Zone Management Act.

Petroleum exploration, development and production frequently are hampered by unpredictable, unnecessary and unwarranted policies and requirements imposed ostensibly under the CZMA. We believe that the CZMA can be properly implemented only if NOAA more carefully monitors both the content and the implementation of coastal zone programs.

We oppose legislation such as S. 1412 that would expand rather than narrow the State authority under the act.

We strongly believe that the CZMA is designed to promote cooperation between the different governmental levels, and not to provide a veto opportunity for the States. And we think some things could be done to implement that cooperation.

If the Senate is contemplating legislation, we encourage it to pursue legislation which would amend the CZMA to emphasize the compatibility of the national goals of energy, self-sufficiency and the objectives contained in the CZMA to somehow coordinate the provisions of the CZMA and the Outer Continental Shelf Lands Act.

The balance between energy development and protection of the coastal zone needs to be reaffirmed, and the State management programs need to be used so they do not frustrate the national goals of energy development.

We think that Congress should consider limiting the scope of the review of the consistency process to insure that the States only review the projects which have direct physical effects on land or water uses in the coastal zone, and that the consistency process is not used to interfere with or override Federal regulatory programs.

We think the States should be prohibited from implementing vague and ambiguous policies for the purpose of consistency review, and should be required to clearly articulate the policies in coordination with the objective of the CZMA act. We think citizens are entitled to know what the law is. They should not have to guess what the law may be.

And lastly, we think the existing criteria for the Secretary of Commerce to override—needs to insure expeditious decisions on consistency denials should be clarified and improved.

We think that this is an appropriate time to review these issues. The sobering fact is that over the past 15 years the Nation's proven oil and gas reserves have dropped about one-third. Despite conservation efforts and record drilling levels in the 1980s, we are using more oil than we are discovering.

Oil imports are once again on an upswing, and they are forecasted to reach 50 percent of the total U.S. oil supply by 1990. Last year alone oil imports from the OPEC countries rose 25 percent, and oil imports from the strife-torn Persian Gulf rose 200 percent. Currently we are importing 44 percent of our total U.S. oil demand.

Maximizing domestic oil and gas production is one of the key ways to reduce our dependence on imported energy. And because the Federal OCS is estimated to contain about one-half of the Nation's future oil and gas reserves, we think its development is indispensible to the Nation's goal of minimizing imported oil.

If the Senate is considering changing the CZMA, then this is the time to bring State coastal programs into conformance with national energy goals.

I would like to introduce Mr. Paul Kelly, Vice President of Rowan Company.

[The statements follow:]

STATEMENT OF CLAIR GHYLIN FOR THE AMERICAN PETROLEUM INSTITUTE AND THE WESTERN OIL AND GAS ASSOCIATION

Mr. Chairman and members of the Committee, my name is Clair Ghylin and I am Manager of Land, Western Region for Chevron Corporation. I am appearing today on behalf of the American Petroleum Institute (API) and the Western Oil and Gas Association (WOGA). API and WOGA are petroleum industry trade associations that represent over 200 companies and 5,000 individuals engaged in petroleum exploration, production, refining, transportation and marketing in the United States. We appreciate the opportunity to participate in these hearings concerning operation of the Coastal Zone Management Act (CZMA).

Industry endorses the basic objective of the CZMA: to achieve a balance between resource protection and orderly coastal development. Regrettably, not all of the states enjoying the benefits of the financial and other incentives created by the CZMA have achieved such a balance in their programs. Instead, the CZMA has been implemented by some states in a way that not only frustrates the orderly use and development of the coastal zone but also runs counter to the clear national objective of reducing dependence on imported energy.

With relatively stable energy prices and a current surplus of world crude oil production, it is fairly easy for the nation to become complacent about basic energy issues. However, the sobering fact is that over the past 15 years the nation's proven oil and gas reserves have dropped by about one-third. Despite conservation efforts and record drilling levels in the early 1980s, we are still consuming more oil and gas than we discover. Oil imports are once again on the upswing and are forecasted to reach 50 percent of total U.S. oil supply by 1990. In 1986, alone, oil imports from the Organization of Petroleum Exporting Countries—the OPEC oil cartel—rose 25 percent and oil imports from the strife-torn Persian Gulf rose 200 percent. Currently we are importing 44 percent of total U.S. oil demand. Maximizing domestic oil and gas production is one of the keys to reducing our dependence on imported energy. Because the federal outer continental shelf (OCS) is estimated to hold more than half of the nation's future oil and gas reserves, its development is indispensable to the nation's goal of minimizing its dependency on imported oil.

The energy resources of the OCS are also important to the country from a fiscal standpoint. Bonuses and rents from OCS leasing and royalties on the 7.5 billion barrels of crude oil and the 75 trillion cubic feet of natural gas produced from the OCS have generated nearly $84 billion since 1954 for the U.S. Treasury. During the last five years, these bonus and royalty revenues have averaged about $5 billion per year. In addition, the petroleum industry and the numerous service companies that operate offshore pay a significant sum to the federal government in the form of income and excise taxes and fees which are directly attributable to OCS energy activities. All this has been accomplished in an environmentally safe manner.

It seems ironic that the CZMA often has been allowed to delay or prevent orderly development of these offshore resources which can contribute so much to federal revenues at a time when the Congress is being asked to make very difficult decisions regarding the budget and spending choices.

In 1984, the U.S. Supreme Court resolved a major CZMA problem by ruling that OCS lease sales are not subject to federal consistency review. Industry believes that it would be unnecessary, unwise and contrary to the national interest for Congress to take actions which could reverse this decision, therefore, we must oppose legislation such as S.1412. In our view, states have adequate opportunity to participate in OCS lease sale decisions through consultation procedures established by Sections 18 and 19 of the Outer Continental Shelf Lands Act Amendments (OCSLA). Under Section 307(c)(3) of the CZMA, the states also have authority to review post-leasing activities such as the exploration and development and production plans for consistency.

However, the industry's problems with consistency have not ended with the resolution of the Sec. 307(c)(1) dispute. Fortunately, most states have not misused their consistency authority over OCS projects. In the Gulf of Mexico OCS area, states have achieved balanced coastal management which accommodates orderly OCS development. I have been involved in Chevron's oil and gas exploration and production operation on the West Coast as an operating manager for many years. I can assure this Committee that, on a day-to-day basis, the industry is experiencing substantial delays and unnecessary complications in OCS exploration and development and production operations in California because of that state's misapplication of consistency.

Specifically:

Industry's efforts to explore and develop OCS energy resources are seriously affected by restrictions and conditions imposed on OCS operators; and

The authority and jurisdiction of the federal government over OCS oil and gas activities are being undermined.

These problems are not mere irritants. They include delays of months or years to OCS oil and gas projects whose costs are very time-dependent.

Although our most critical CZMA problems to date have occurred in California, the potential exists for other states to follow the example of the California Coastal Commission in its misapplication fo the CZMA. Therefore, we urge that the Committee resist legislative efforts like S. 1412, that could grant a virtual veto power to the states with respect to federal leasing decisions. Further, we urge that the Committee reject any efforts to grant to the states more authority over the permitting of operations. If anything, the Committee should take steps to limit such authority. Our recommendation is that legislative action be taken to:

Reaffirm the balance between OCS energy development and protection of the coastal zone;

Clarify the existing limitations on state consistency reviews of OCS projects;

Require specific, predictable coastal program policies; and

Simplify the Secretarial appeal process.

Let me explain through examples how the consistency authority is being improperly applied and describe the adverse effect this misuse is having on the nation's offshore oil and gas exploration and development efforts.

IMPROPER USE OF THE CONSISTENCY AUTHORITY

Perhaps the most serious CZMA problem is the tendency of some states to extend their consistency authority beyond its intended scope. The consistency provisions of the CZMA gave states the ability to participate in the OCS process which otherwise would be within the exclusive realm of federal jurisdiction. Congress recognized the unique power of this new authority and set specific statutory limitations on its use.

First, consistency reviews of OCS activities are allowed under the CZMA only where a proposed OCS activity will directly affect land or water uses in the coastal zone.

Second, states are prohibited from using consistency in a way which would undermine, diminish or supersede federal jurisdiction and responsibility.

Unfortunately, some states do not recognize these limitations. Instead of confining consistency reviews to those aspects of proposed OCS oil and gas projects directly affecting land or water uses in the coastal zone, some states have attempted to control nearly every aspect of an OCS project. This includes operations and facilities that take place solely on the OCS and which have no physical effects on the coastal zone.

In addition, Congress never intended to provide states with the opportunity to second-guess and overrule the judgment and expertise of federal agencies concerning specific requirements for operations that take place on the OCS. For example, the advice of the Minerals Management Service (MMS) is often ignored or disputed by some states, despite this agency's expertise in many highly technical areas related to the engineering, design and geological safety of OCS projects. The California Coastal Commission (CCC), for example, continues to intrude into many aspects of OCS projects which are already stringently regulated by the U.S. Department of the Interior (DOI). This includes the geological safety of the OCS location of exploratory drilling rigs, platforms, and pipeline routes; the amount of oil spill containment equipment to be kept on the OCS facilities; and even the drillpipe and casing to be used.

The CCC has also used consistency to supersede Coast Guard decisions regarding navigation safety on the OCS. The Commission has, for example, insisted that oil companies install automatic radar devices on drillships as a condition for obtaining consistency concurrence. This requirement was imposed despite the Coast Guard's advice that both the drilling rigs and the ships moving through the area were already equipped with sufficient navigational aids and equipment to minimize collision risks. This is also an illustration of a state extending its jurisdiction to activities that are already stringently regulated by the federal government. This dual layer of regulation is economically inefficient and provides no additional environmental benefits. Moreover, it interferes with federal jurisdiction on the OCS.

Congress also singled out two major federal laws—the Clean Air Act (CAA) and the Federal Water Pollution Control Act (FWPCA)—for special consistency treatment. It provided that compliance with programs developed under these two federal laws is to be the only standard used for determining consistency as to air and water quality aspects of proposed activities.

States should not be allowed to use consistency to enforce their own air and water quality programs which differ from those created by federal law. Section 307(f) of CZMA prohibits states from using their CZMA authorities to impose any air or water quality protection requirements that are different from those established by the regulatory programs developed under these two statutes.

Instead, the state coastal agency must incorporate the regulatory programs that have been imposed under the FWPCA and CAA into its state program. The requirements of such programs should be the only ones that can be applied to activities undergoing consistency review.

The federal air and water quality protection regulatory programs developed pursuant to the FWPCA and CAA are applicable to OCS facilities and activities. The National Pollutant Discharge Elimination System (NPDES) permit program, created by Section 402 of the FWPCA, is administered and enforced on the OCS by the Environmental Protection Agency (EPA) and DOI. General or individual permits for discharges under this program are issued by EPA after full opportunity for state agencies and public participation is provided. An air quality regulatory program promulgated under the OCSLA is also enforced on OCS activities. DOI's air quality regulatory program implements those standards of the CAA applicable to the OCS.

Despite the clear direction of Section 307(f), states have used the consistency process to impose conditions, restrictions and limitations on OCS activities which are beyond those required by these air and water regulatory programs. Unnecessary conditions and restrictions on NPDES water discharge permits for OCS activities, which would not otherwise be imposed by EPA, have been demanded. In addition, the CCC has frequently attempted to use consistency review to impose air quality restrictions on OCS facilities that are different from the federal requirements imposed pursuant to the OCSLA and CAA. Section 307(f) was intended to prohibit such state interference in air and water quality regulatory programs created pursuant to the FWPCA and CAA.

A somewhat different example of the misuse of the consistency process is the imposition of seasonal restrictions on OCS operations by the CCC to ensure that commercial fishermen have exclusive use of OCS areas during their fishing seasons. It is important to note that the commercial fishing at issue is taking place on the federal OCS, outside the state's coastal zone, where the federal government exercises exclusive jurisdiction to regulate competing commercial uses. Nonetheless, the Commission imposed a seven-month per year ban on an Exxon OCS exploratory drilling program to protect thresher shark fishermen from possible economic impacts resulting from these operations. Exxon's proposed drilling activities were expected to be completed in less than 100 days and would have occupied only 6.5 acreas of the vast area offshore California where the highly migratory thresher sharks are found. These operations would have had little or no impact on commercial fishing operations in the vicinity of Exxon's well. The impact of this unnecessary restriction would have been to reduce the time within the five-year primary lease term that Exxon had to actually drill to only a little over two years.

With such seasonal restrictions on drilling, it would be virtually impossible for lessees to complete exploration and proceed with development plans during the five-year primary lease term, thus slowing the pace of the national OCS program.

We believe that this is a problem which should be of particular interest to Congress, since misapplication of the CZMA is preventing the proper implementation of the OCSLA. Seasonal drilling restrictions, for example, seriously impede DOI's ability to fulfill its statutory obligation to ensure the "prompt and efficient exploration and development of a lease area", as required by the Act.

Another example of state misuse of the CZMA consistency provisions involves attempts to require OCS lessees, who have paid substantial amounts for the right to explore and develop the OCS, to compensate other commercial users of the OCS. In one case, an oil company had to agree to pay $1,000 to a California fishing association for each day of the fishing season that OCS drilling operations took place. The company paid more than $150,000 to the association to compensate for the alleged interference with commercial thresher shark fishing in a less then 10-acre area of the OCS. Ironically, in the previous year, the California Department of Fish and Game statistics indicated that fewer than 250 sharks (approximate value $25,000) had been caught from the entire 60,000 acre fishing block within which the exploration activities would take place.

We believe the such financial compensation requirements should not be imposed on OCS operators through the consistency process.

LACK OF SPECIFIC POLICIES IN COASTAL PROGRAMS

Offshore oil and gas operations often are hampered by the lack of specific, predictable policies in state coastal programs. OCS operators have had tremendous difficulty over the last few years determining whether proposed activities included in OCS projects are consistent with the California Coastal Management Program because the policies established in the program are so generalized and ambiguous. The California Coastal Commission uses very general statements in its program and then imposes very specific standards, limitations and prohibitions on OCS projects. These limitations are identified and "adopted" by the Commission on a piecemeal basis, as it considers individual permit and consistency applications. Consequently, consistency with the California program is an ever-moving target. Despite extensive preparation, OCS operators never know whether some new requirement or mitigation measure will be demanded at the last minute. This is an inequitable situation clearly not intended by the CZMA.

As an example, Exxon experienced this problem first hand in its attempts to develop a very valuable reserve in the Santa Barbara Channel called the Santa Ynez Unit. This 19-lease unit is one of the largest oil and gas reserves in the continental United States. It holds an estimated 300–400 million barrels of oil and 600–700 billion cubic feet of natural gas. The development plans called for the continued use of U.S. flag tankers to transport the crude to refineries.

Although there is nothing in the California program which prohibits marine transportation of oil produced offshore California, the Coastal Commission would not allow this project to proceed unless Exxon agreed to transport its crude oil by pipeline. Other OCS operators have been subject to the same pipeline demand for their projects. The Commission based the demand on its interpretation of vague environmental protection policies. Thus, the Commission has created what is, in effect, a requirement that oil produced offshore California be moved by pipeline to refinery destinations instead of by tankers, even though there is no such policy in the state program. The Commission has managed to enforce this requirement on all OCS operators without any attempt to officially incorporate it into the state program.

Another example of this problem is a case in which the California Coastal Commission denied consistency for an exploration project proposed by Gulf Oil Corporation. Even though the Commission found that maximum feasible mitigation had been offered by Gulf, it denied consistency on the nebulous basis that the public welfare would not be promoted. The commission concluded that "it would be inexpedient and unwise at this time to expand oil and gas operations . . . until previously leased tracts are fully explored and developed." In our view, neither the CCC nor any other coastal agency has been given authority by the CZMA to make such a decision. The lessee alone should be able to decide when to explore and develop a lease subject to appropriate guidance from the coastal agency. This behavior demonstrates an alarming lack of respect for the nation's interests as a whole in developing needed domestic energy resources.

A final example of the extent to which the OCS has exceeded the scope of the CZMA is the Commission's handling of Chevron's platform Gail project. The following are just a few of the "mitigation" measures demanded by the CCC which are well outside the limits of the CZMA and definitely not contained clearly in the policies of California's Coastal Management Plan:

The Commission tried to force Chevron to pay $250,000 to "offset impacts" to the Channel Islands National Park.

The Commission tried to interject itself, as it has in other projects, into the regulation of navigation and vessel traffic safety on the OCS—the exclusive province of the U.S. Coast Guard.

Unnecessary consideration of concerns related to commercial fishing on the OCS substantially interfered with timely approval of the Platform Gail development and production plan. Protection and regulation of fishery resources in federal waters is the province of the National Marine Fisheries Service, not the CCC.

The Commission even concerned itself with the structural integrity of OCS platforms and the stresses present during transoceanic tows. OCS operators already must conform to MMS standards in the construction of OCS platforms. The state has no authority to impose its own requirements on structures in federal waters. Further, the Coastal Commission has no right whatsoever to regulate or interfere with towing activities occurring on the high seas.

The CCC required "mitigation payments" of $850,000 related to commercial fishing "impacts". Such demands are totally unjustified. Any losses to commercial fishermen are compensated by operation of the federal fishermen's contingency fund. Disputes between fishing interests and oil and gas lease holders on the federal OCS should be resolved by federal—not state—authorities.

These are just a few of the unnecessary and unauthorized requirements imposed on Chevron's platform Gail and on other projects on the federal OCS offshore California.

In our view, this pattern of misbehavior is due in large part to the failure of the National Oceanic and Atmospheric Administration (NOAA) to properly enforce the provisions of the CZMA. Proper administration of the Act would require more precision from the states, reduce their willingness to interfere in those matters that are federal responsibility and, as a result, mean more timely and appropriate review of OCS petroleum projects for consistency with state plans.

A somewhat different but related problem has been incorporation of local coastal programs into state programs, without going through the formal amendment process. These local programs often contain significant requirements directly affecting oil and gas development. Consequently, their incorporation can constitute substantive modifications to a state's approved plan. Attempts were made in both California and Alaska to bypass the amendment process in adopting local programs. This should not be allowed. Local coastal programs should be adopted only by amendment to the state plan, thereby ensuring the use of a process that allows for adequate notice, public hearings and opportunity for comment and consultation.

PROBLEMS WITH THE APPEAL PROCESS

Finally, industry's problems with the state's application of federal consistency to OCS projects are compounded by the unavailability of a simple, rapid appeal process. Override decisions are never forthcoming within the 90-day time period contemplated by NOAA's regulations. For example, Exxon's appeal of the consistency denial for the Santa Ynez Unit development project was pending before the Secretary of Commerce for 19 months before the parties requested a stay while a settlement was negotiated.

In Exxon's Santa Rose Unit appeal, which challenged the Coastal Commission's attempt to impose seasonal prohibitions on OCS drilling, Exxon waited eight months for the Secretary's decision. Other operators have experienced similar, costly delays.

A practical, expeditious appeal process is critical if the override procedure is to be of any real benefit. The CZMA clearly contemplates the availability of an expeditious process through which the federal government can override consistency denials that could preclude projects necessary to the national security and defense or which will result in important national interest benefits.

PROPOSED SOLUTIONS

I have indicated some of industry's major problems with the implementation of the Coastal Zone Management Act. Now let me tell you our proposed solutions. We believe legislative action should be taken to accomplish the following:

First. Congress should emphasize the compatibility of the national goals and objectives contained in the CZMA and the Outer Continental Shelf Lands Act. The balance between OCS energy development and protection of the coastal zone should be reaffirmed and use of state management programs to frustrate the national goal of developing OCS oil and gas resources should be prohibited.

Second. There should be a limit on the scope of the consistency review process to ensure that states:

Review only those aspects of OCS projects which have direct physical effects on land or water uses within the coastal zone; and,

Do not apply consistency in a manner which interferes or is inconsistent with federal regulatory programs.

Third. States should be prohibited from adopting and implementing vague and ambiguous policies for the purpose of consistency review. State coastal policies should be clearly articulated and directly linked to the objectives of the Act.

Fourth. The existing criteria for a secretarial override to ensure expeditious decisions on consistency denials must be clarified and improved.

WHY ARE CONSTRUCTIVE CHANGES TO CZMA NEEDED?

One of our nation's best hopes for minimizing dependence on insecure oil imports lies in the federal OCS where a large portion of the nation's future oil and gas discoveries are expected to occur. This expectation is fast becoming reality. Data published by the Department of Energy clearly show that an increasing percentage of U.S. proved reserves are located offshore. Yet, offshore oil reserves increased from only 8 percent of the U.S. total in 1977 to 12.6 percent of the total in 1986. Also, much of this growth occurred offshore California which grew from about 17.8 percent of U.S. offshore reserves in 1977 to 44.9 percent in 1986.

Unfortunately, however, OCS hydrocarbon reserves are not being developed and produced in a timely manner. Development and production of offshore California reserves is not keeping pace with discovery. Consistency related regulatory delays in bringing offshore California reserves onstream will only worsen this trend at a time when the nation is becoming increasingly reliant on imported oil. Without clear, predictable state coastal plans and more diligent oversight by NOAA, our dependence on imports will only get worse, at huge costs to our economy and our national security.

Many actions by states under the guise of federal consistency are inappropriate and should not be allowed to frustrate vital national energy policies. We urge Congress to consider the changes to CZMA we have recommended to ensure that future generations enjoy the national security and economic prosperity that our OCS energy resources can help provide.

STATEMENT OF E. EDWARD BRUCE, ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE AND WESTERN OIL AND GAS ASSOCIATION

Mr. Chairman and members of the Subcommittee, my name is E. Edward Bruce. I am an attorney with the law firm of Covington & Burling in Washington, D.C., and appear here on behalf of the American Petroleum Institute (API) and the Western Oil & Gas Association (WOGA). API and WOGA oppose S. 1412 to amend Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. Sec. 1456(c)(1), for the following reasons:

First, the bill would extend to the States an undefined measure of control over the Outer Continental Shelf (OCS), thereby potentially retarding OCS energy development at a time when there is a critical need to find new domestic sources of oil and gas.

Second, the amendment will breed litigation becausew neither it, nor the CZMA, nor CZMA programs provide judicial or administrative standards by which to measure the extent of the authority being granted to the State.

Third, the amendment is not necessary to assure consultation between the federal government and the States. Instead, it could frustrate existing consultative procedures which have been successfully utilized to assure an appropriate balance of federal and State interests in OCS leasing.

Finally, the amendment is not necessary either to assure adequate environmental protection of the coastal zone or to protect the integrity of CZMA programs.

THE AMENDMENT WOULD GRANT AN UNDEFINED MEASURE OF CONTROL TO THE STATES AND THEREBY DISSERVE THE NATIONAL INTEREST

Section 307(c)(1) commands that federal activities "directly affecting" the coastal zone "shall" be conducted in a manner that is "consistent to the maximum extent practicable" with State CZMA programs. S. 1412 greatly expands the scope of the section 307(c)(1). Under the revised language, if intended to reach OCS leasing, States would achieve enhanced substantive authority over federal activities that would disserve the national interest.

1. *An amendment to Section 307(c)(1) To Subject OCS Leasing to Consistency Review Would Ignore Long-Established Federal Interests in OCS Leasing.*—In 1972, Congress enacted the CZMA against the background of the several Supreme Court "Tidelands Oil" cases asserting federal supremacy over all submerged lands [1] and the later "1953 Compromise" by which Congress granted coastal States ownership of submerged lands within three miles (or in two instances three leagues) of their coasts, 43 U.S.C. Sections 1301(a), 1311(a), but reserved for the federal government exclusive proprietary control over the soil and seabed of the OCS outside this coastal zone, 43 U.S.C. Sections 1302, 1332(a).

CZMA Sec. 307 gave States some measure of authority over certain federal activities. However, its passage did not disturb the balance between the federal government and the States struck by the 1953 Compromise. Thus, Congress defined the seaward limits of the "coastal zone" as being coterminous with that portion of the submerged lands over which States were given proprietary control by the 1953 Compromise. CZMA Sections 304(a) & (b), 16 U.S.C. Sec. 1453(a) & (b). Moreover, Congress insisted that "nothing" contained in the CZMA "shall be construed . . . to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development or control of water resources, submerged lands, or navigable waters. . . ." CZMA Sec. 307(e)(1), 16 U.S.C. Sec. 1456(e)(1) (emphasis added). In the light of those provisions and the Act's legislative history,[2] the Supreme Court in *Secretary of the Interior* v. *California* 464 U.S. 312, 330 (1984), felt "impelled to conclude that the 1972 Congress did not intend Sec. 307(c)(1) to reach OCS lease sales." 104 S. CT at 666. Thus, an expansion of Section 307(c)(1) to reach OCS leasing would run counter to long-established principles concerning federal control over OCS leasing.

2. *Vesting Control Over OCS Leasing in the States Would Disserve the National Interest.*—The benefits derived from OCS leasing activities are national. The federal Treasury receives the large cash bonuses paid by bidders at lease sales and similarly enjoys the sizeable royalties that accrue when commercial quantities of OCS oil and gas are ultimately produced—to date more than $84 billion.

The OCS has produced 7.5 billion barrels of crude oil and more than 75 trillion cubic feet of natural gas. This oil and gas is widely distributed to industrial, commercial, residential, and individual consumers across the land. Thus, residents of our land-locked States, both as federal taxpayers and as consumers, have an interest in the production of OCS oil and gas that is as great as those located on the coasts.

Technological advances and rigorous regulatory controls have very substantially reduced the environmental impacts associated with OCS oil and gas activities. Since 1970, over five billion barrels of OCS oil have been produced without a single major oil spill from an exploration or production operation. Nevertheless, some coastal States, particularly those adjacent to frontier OCS leasing areas, continue to display anxiety about such activities. Thus, vesting decisional authority in coastal States with respect to OCS leasing would often lead to the striking of a balance between national and State interests that would be quite different from the one that would be struck by a federal officer who must take into account the national benefits of leasing, as against its localized impacts.

Accordingly, if S.1412 is interpreted to address OCS leasing, its passage would in all likelihood retard the development of at least some of those lands. Such action would defy the policy articulated by Congress when it adopted the 1978 OCSLA to permit "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." 43 U.S.C. Sec. 1802(1).

---

[1] *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950).

[2] The sponsors of the 1972 CZMA successfully opposed all amendments extending the CZMA "beyond any territorial sea . . . into what we call a contiguous zone from the 3-mile limit to the 12-mile limit." 118 Cong. Rec. 14,184 (1972) (remarks of Sen. Hollings). The House bill had proposed a federal, not State, program for this "contiguous zone," thus similarly recognizing that extending State-administered CZMA programs beyond the three-mile limit would violate the 1953 compromise. H.R. Rep. No. 1049, 92d Cong., 2d Sess. 7 (1972). However, even this proposal was stricken from the bill in conference, since it "would create potential conflicts with legislation already in extence concerning Continental Shelf resources"—*i.e.*, the OCSLA. H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 15 (1972).

The events of recent years have not lessened the validity of these findings and policy declarations. To the contrary, the United States is as dependent today upon foreign sources of oil as it was in 1973 when we suffered the first Arab oil boycott, and the nations upon whom the Free World relies for oil imports are less stable today than they were then.

3. *Vesting Control of OCS Leasing in the States Would Upset the Equitable Sharing and Balance in the OCS Leasing Program.*—Under Section 18 of the OCSLA, a five-year OCS leasing program must be based, among other things, on

"(B) an equitable sharing of development benefits and environmental risks among the various regions;

"(C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;

"(D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes;

* * * * * * *

"(G) the relative environmental sensitivity and marine productivity of different areas of the [OCS] . . . ." OCSLA Sec. 18(a)(2), 43 U.S.C. Sec. 1344(a)(2).

Secretary Watt's five-year program met these standards. The new plan adopted by Secretary Hodel also, in our view, meets these standards. Empowering coastal States to apply their CZMA programs to oppose individual OCS sales could seriously affect or even destroy the balance achieved in the leasing program, for the overall implementation of the program would be transferred from a federal officer with a national perspective to State officials giving primary emphasis to local concerns.

THE AMENDMENT TO SECTION 307(C)(1) WOULD FOMENT LITIGATION

Far from avoiding litigation, the adoption of the proposed amendment if intended to reach OCS leasing will give rise to additional litigation over OCS leasing.

For example, in planning OCS Sale No. 73 (Offshore Central California), the Secretary of the Interior consulted with California's Governor pursuant to Section 19 of the OCS Lands Act (OCSLA), 43 U.S.C. Sec. 1345. The Governor recommended that Interior delete near-shore tracts and impose lease stipulations on the others dealing with, among other things, air quality, fishery operations, and the transport of oil by pipeline. When Interior agreed to most of these recommendations, the Governor's spokesman stated that these modifications would "accomplish the necessary balance between production of needed oil and gas and protection of our valuable environmental resources.[3]

Nonetheless, the California Coastal Commission (CCC), the independent agency which administers California's CZMA program, filed suit to enjoin the leasing of *any* tracts in the Sale No. 73 region.

As can be seen by this experience, the vague provisions of CZMA programs invite anyone with appropriate authority in a State CZMA agency, an Attorney General's office or the local governments potentially affected by an OCS sale to challenge OCS leasing the CZMA. This litigation threat is documented not only by the California Sale No. 78 case, but also by the nine similar suits filed prior to the Supreme Court's decision: three additional California cases and other filed by Massachusetts, New York, New Jersey, Maryland, North Carolina, and Alaska local governments.

Perhaps an even greater litigation threat would be the Section 307(c)(1)-based lawsuits filed by so-called "public interest" litigation groups. Such groups have already been held to have standing to sue under the statute.[4] Thus, they could institute litigation to halt any federal activity having the nexus with the coastal zone described in S. 1412, even if no State or local government agency chooses to do so. The NEPA-based lawsuits to enjoin federal projects, which have arisen out of the vague and general terms of that statute, clearly foreshadow a similar invocation of the comparably expansive terms of the CZMA, as it would be amended.

AMENDMENT OF SECTION 307(C)(1) COULD FRUSTRATE EXISTING CONSULTATION PROCEDURES

If S. 1412 would subject OCS leasing to its requirements, then specifically applicable consultation procedures would be frustrated. The history of the California case discussed above shows that there is presently ample and effective opportunity for OCS leasing consultation. Under Section 19(a) of the OCSLA, 43 U.S.C. Section 1345(a), governors of affected States may make "recommendations" to the Secretary of the Interior concerning the "size, timing or location" of OCS leasing. The Secretary must accept the governor's recommendations, unless he determines that they do not provide for an adequate balance between the national interest and well-being of the citizens of the affected States. OCSLA Section 19(c), 43 U.S.C. Section 1345(c). Moreover, if he makes such a determination, the Secretary must communicate to the governor in writing the reasons for his decision, after an opportunity for consultation to implement alternatives that would strike a reasonable balance between these interests.

---

[3] Letter from G.W. Duffy, Secretary of Environmental Affairs, to James Watt, Secretary of the Interior (October 6, 1983).

[4] *California* v. *Watt*, 683 F.2d 1253, 1269–71 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 656 (1984).

Section 19 of the OCSLA was enacted in 1978, six years following the passage of Section 307(c)(1) of the CZMA, at the urging of the coastal States, particularly California and Massachusetts.[5]

On the basis of those arguments by the States, Congress adopted Section 19 of the OCSLA "to insure that the Secretary give[s] thorough consideration to the voices of responsible regional and local State officials in planning OCS leasing and development." [6]

However, Congress made clear that Section 19 gives "final" authority to the Secretary of the Interior because it "did not believe that any State should have a veto power over OCS oil and gas activities." [7]

As Congressman Murphy explained on the floor of the House of Representatives: "The conference report [through OCSLA Section 19] would open Interior's decision-making process so that relevant outsiders—and in particular, State governments and through States, local government—may present their views and must be heard. They would not have a veto—only an opportunity to present their views and assurances that those views will be considered." [8]

The proposed amendment to Section 307(c)(1), if applicable to OCS leasing is thus not only unnecessary to achieve consultation, but actually it can frustrate the consultative mechanism that Congress has established for State input into the OCS process, as the Sale No. 73 dispute with the California Coastal Commission so vividly illustrates.

AN AMENDMENT TO SECTION 307 (C) (1) IS NOT NECESSARY FOR ENVIRONMENTAL PROTECTION OF THE COASTAL ZONE

Apart from the CZMA, there is a full range of rigorous federal environmental laws, such as the National Environmental Policy Act, the Endangered Species Act, the Marine Mammal Protection Act, and the Clean Water Act, which apply both to State coastal waters and to activities on the federal OCS. OCS activities must meet these standards that Congress has defined, as well as those established in 74 sets of federal regulations, to achieve an appropriate balance between industrial activity and environmental protection. Moreover, the OCSLA recites protection of the OCS and coastal environment as among its principal purposes.[9] The Act is, therefore, embedded with provisions requiring the most careful attention to environmental concerns.[10]

AN AMENDMENT TO SECTION 307 (C) (1) IS NOT NECESSARY TO PROTECT THE INTEGRITY OF CZMA PROGRAMS FROM OCS DEVELOPMENT

The 1976 amendments to the CZMA amended Section 307(c)(3) to apply it explicitly to the exploration and production/development plans submitted by OCS lessees. In doing so, the Conference Committee refused to apply the statute to the issuance of OCS "leases" and instead stated that it was applying "the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior." [11]

---

[5] The Hearings on S. 9 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 584 (1977) (Statement of the director of California's Office of Planning and Research). California's position with respect to the need for Section 19 was echoed by Alaska and Massachusetts. *Id.* at 514 (statement of Robert LaResche, Alaska Commissioner of Natural Resources); Hearings on H.R. 1614 Before the House Ad Hoc Select Comm. on Outer Continental Shelf, 95th Cong., 1st Sess. 671-72 (1977) (statement of Evelyn F. Murphy, Massachusetts Secretary of Environmental Affairs).

[6] S. rep. No. 284, 95th Cong., 1st Sess. 78 (1977).

[7] *Id.*

[8] 124 Cong. Rec. 26,778 (1978).

[9] *See, e.g.*, 43 U.S.C. Secs. 1802(2), (3), (7).

[10] See e.g., 43 U.S.C. Secs. 1334(a)(2)(A), 1344(a)(2) & (3), 1346 & 1351(h)(1)(D).

The Conference Report also stated that "[t]his provision will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans." [12]

This is as true today as it was in 1976. No physical activity takes place at the time of OCS leasing that could have an impact upon their coastal zones. Instead, the arguments for applying the CZMA to OCS leasing all turn upon environmental impacts that *might* occur at the later exploration or development/production stages of an OCS project, when, of course, the states will have a full opportunity to invoke Section 307(c)(3). It is only at these stages that specific plans are set forth and States' CZMA programs can be sensibly applied to require adjustments to assure consistency. For example, after exploration has discovered oil and a lessee has proposed a specific pipeline, a State can apply its CZMA program to direct its rerouting to avoid sensitive areas.

Prior to an OCS sale, the State is confronted with no such specific issues. It can, at this point, only guess at the issues which will later arise. Such premature speculation is not the intelligent management of the coastal zone that the CZMA was meant to foster.

Finally, the clearly defined procedures that must be followed in achieving consistency under Section 307(c)(3) at the exploration or development/production stages highlight the inappropriateness of seeking to achieve consistency at the earlier leasing stage pursuant to Section 307(c)(1). An OCS lessee submitting a plan of exploration for approval or later a plan of development and production must certify to a State CZMA agency that its activities, insofar as they affect land or water uses in the coastal zone, will be conducted in a manner consistent with the State program. The State is empowered either to agree or disagree with that certification and, if it disagrees, to suggest alternative means by which consistency can be achieved. Should the State decide that the operations are not consistent and cannot through any practicable means be made so, the lessee is entitled to appeal to the Secretary of Commerce, who can overrule the States's decision upon a determination either that the proposed activities are consistent with the objectives or policies of the CZMA or that they are necessary in the interest of national security.

By contrast, Section 307(c)(1), does not now, and would not as amended, provide for Secretary of Commerce review to ensure that States do not abuse such authority as they may have.

ANALYSIS OF SPECIFIC PROVISIONS OF S. 1412

When introducing S. 1412, Senator Hollings that it was intended to reverse the Supreme Court's decision in *Secretary of the Interior* v. *California* that Section 307(c)(1) does not apply to OCS leasing. However, this bill, if adopted, would not only accomplish that result, it would also expand the scope of State consistency authority beyond that which they would have enjoyed had the Supreme Court ruled that Section 307(c)(1) applies to OCS leasing. Thus, while API and WOGA take the position that no amendment to Section 307(c)(1) is justified to overrule the Supreme Court's decision, they also present their views as to the implications of the specific amendments that are proposed in the bill.

SIGNIFICANTLY AFFECTING THE NATURAL RESOURCES OR LAND AND WATER USES IN THE COASTAL ZONE

Section 307(c)(1) presently applies only to federal activities "directly affecting the coastal zone," and the Supreme Court held that OCS lease sales have no "direct" effects on the coastal zone since the issuance of a lease, standing alone, involves no activities that could have such effects.

S. 1412 would substitute the phrase "significantly affecting the natural resources or land or water uses in the coastal zone" for the "directly affecting the coastal zone" language now contained in Section 307(c)(3). In two different ways this would broaden the scope of the statute.

As indicated by Senator Hollings, the term "significantly affecting" language is borrowed from the National Environmental Policy Act (NEPA). Under that statute, a federal activity "significantly affecting" the environment must be analyzed in an EIS to allow the federal decision-maker to determine whether to proceed with the action. It is perfectly appropriate to require the preparation of EISs at early stages of federal activities (just as is done at the leasing stage of an OCS project) to insure that federal decision-makers are fully informed as to both the impacts of and alternatives to their actions. EISs are, therefore, necessarily speculative and involve alternative scenarios which may or may not flow from a proposed action.

---

[11] S. Conf. Rep. No. 987, 94th Cong., 2d Sess. 30 (1976).

[12] *Id.*

It is quite another matter, however, to demand consistency with state CZMA programs via the same "significantly affecting" language. It is impossible, at the leasing stage, to forecast a precise scenario for an OCS project to determine whether the activities will or will not be consistent with a state's CZMA program. Most consistency issues arise at the final development/production stage, when platforms are erected and plans are laid for the transportation of oil to shore. Regrettably, in many instances the production and development stage will never be reached, since exploration will not be successful. And even where exploration is successful, it is impossible at the leasing stage to forecast where the oil will be located, how it will be produced and how it will be transported. Accordingly, it would be a serious mistake to import the "significantly affecting" language from NEPA into the CZMA.

There is still another flaw in this aspect of the bill. Section 307(c)(3)(B) applies to the OCS exploration and development/production stages only for activities "affecting any land use or water use in the coastal zone . . . " S. 1412 goes beyond Section 307(c)(3)(B) and applies to activities significantly affecting "the natural resources or land water uses in coastal zone." There is no apparent reason to provide a more expanded reach of consistency review in Section 307(c)(1) that now exists in Section 307(c)(3)(B).

FULLY CONSISTENT WITH THE ENFORCEABLE MANDATORY POLICIES OF APPROVED STATE MANAGEMENT PROGRAMS

Section 307(c)(1) presently provides that activities directly affecting the coastal zone need be consistent with state management programs only "to the maximum extent practicable." The Ninth Circuit in extending Section 307(c)(1) to OCS leasing (prior to being reversed by the Supreme Court in *Secretary of the Interior* v. *California*), emphasized that the "maximum extent practicable" provision of the statute gave the Secretary of the Interior necessary flexibility to conduct OCS leasing while paying heed to state CZMA programs.

As applied to OCS leasing S. 1412 would remove that flexibility by requiring that leasing be "fully consistent" with the mandatory policies of approved programs unless the activity is undertaken to "counter the immediate effects of a national emergency declared by the President," is "undertaken by the Secretary of Defense and is necessary for reasons of national security," or is "required by . . . federal law which prevents consistency." These three exceptions to the full consistency required by the statute would rarely be applicable in an OCS leasing context. Thus, virtually no discretion would be available to the Secretary of the Interior in his conduct of OCS leasing activities.[13] The lack of flexibility for federal decision makers envisioned by S. 1412 should, once again, be contrasted with the consistency scheme as it now applies to OCS exploration and production/development. To be sure, there is no "maximum extent practicable" exception to the requirement of Section 307(c)(3). However, the Secretary of Commerce is granted authority to override a state's denial of consistency if he finds "that the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security." 16 U.S.C. Sess. 1456(c)(3)(A) and (c)(B)(iii).

This provision of Section 307(c)(3) demonstrates the need for the exercise of discretion by a federal officer regarding application of CZMA programs to federal activities that affect coastal zones. By depriving federal officers of such discretion, S. 1412 would deliver into the hands of the states a measure of authority that exceeds anything that is now described in the CZMA.

---

[13] API and WOGA recognize that NOAA's present regulations—15 C.F.R. Sec. 930.32(a)—define "consistent to the maximum extent practicable" as requiring full consistency "unless compliance [with the state program] is prohibited based upon the requirements of law applicable to the federal agency's operations." However, their criticisms of the way in which S. 1412 would remove the "maximum extent practicable" provision of the statute remains apposite for two reasons.

First, API and WOGA believe that NOAA has misconstrued the "maximum extent practicable" provision of the statute and urge that this misconstruction not be perpetuated by a change in the statute itself. Second, NOAA's present regulations allow deviation from full consistency "because of some unforeseen circumstances arising after the approval of the management program which presents the Federal agency with a substantial obstacle that prevents a complete adherence to the approved program." 15 C.F.R. Sec. 930.32(b). S. 1412 does not permit even this limited measure of flexibility in connection with the application of Section 307(c)(1).

Mr. KELLY. Thank you, Mr. Ghylin.

Mr. Chairman, I too have a formal statement which I would like to have submitted for the record. And in my brief remarks, I will try not to duplicate anything that has been said previously.

My name is Paul Kelly. I am vice president of Rowan Companies, Inc., which is based in Houston and owns a fleet of mobile offshore drilling rigs which operate under contract to oil and gas companies. In addition, we operate land drilling rigs in Alaska and the lower 48 States, as well as a fleet of helicopters and fixed-wing aircraft which provide services largely for the petroleum industry.

I am appearing today on behalf of the National Ocean Industries Association which represents a different segment of the petroleum industry, namely those service companies that build and manufacture the vessels, equipment and supplies and provide the services and manpower necessary for minerals exploration on the OCS.

I would like to make two points that have not been covered so far. First, I would like to address the question of regional imbalance in the OCS program. The proposed amendments to section 307(c)(1) are certain to exacerbate the geographical imbalances in our OCS leasing program contrary to the OCS Lands Act Amendments of 1978. Section 18 of the OCS Lands Act provides that there must be an equitable sharing of development benefits and environmental risks among the various regions.

In the context of that law, how can we justify the fact that over 97 percent of the wells drilled on the Federal OCS to date have been located in the Gulf of Mexico? By contrast, how can we justify that today some 75 percent of the California OCS is off limits to oil and gas leasing?

The last two administrations have adopted programs which meet their statutory obligations regarding geographical balance. S. 1412 would empower individual States to use their coastal zone management programs to place local concerns above the national interest and destroy whatever hope we have for achieving regional balance in our off-shore leasing.

The second point I would like to make relates to the international implications of S. 1412. I have just returned from a 2-year assignment in London as managing director of an Anglo-American joint venture drilling company active in the North Sea. Being fresh from that experience, I cannot help but make some contrasts and reflect on this bill from an international perspective.

Since 1981 the active rotary rig count in the United States has fallen by 76 percent, more than triple the rate for the rest of the world. In just 1 year, from 1985 to 1986, exploration and development expenditures in the United States have declined by almost 40 percent, and employment in oil and gas extraction dropped by 34 percent. In fact, since 1982 over 300,000 jobs have been lost in America's oil producing States.

In 1985——

Senator KERRY. Let me just make clear.

Mr. KELLY. Yes.

Senator KERRY. I am sure you are not alleging that is a result of the consistency provisions of the current law.

Mr. **KELLY**. No, Mr. Chairman, we are not. But we are——

Senator **KERRY**. OK. You are underscoring a problem.

Mr. **KELLY**. Yes, I'm underscoring a problem.

Senator **KERRY**. But there has been an enormous downturn in the industry due to prices and a whole lot of other things. Correct?

Mr. **KELLY**. Among those other things, I think it is fair to say that leasing moratoria and reduced activity on the California OCS have had a great deal to do with reducing employment in our industry in that State. For example, between 1980 and 1985 employment in the oil service industry in California declined by 55 percent. During that time some 12,100 people among 37 oil service companies located in that State were laid off or moved out of State. We attempted to do——

Senator **KERRY**. Let me—go ahead. I'm sorry.

Mr. **KELLY**. I was going to say we attempted to update that survey in connection with this hearing, but were unable to locate enough companies remaining in existence to make it worthwhile.

STATEMENT OF PAUL L. KELLY, ON BEHALF OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION

Mr. Chairman and members of the Committee, I am Paul L. Kelly, Vice President of Rowan Companies, Inc. Rowan owns a fleet of mobile offshore drilling rigs which operate under contract to various oil companies throughout the world. In addition, we operate land drilling rigs in Alaska and the Lower 48 states as well as a fleet of helicopters and fixed wing aircraft which provide services largely for oil and gas operators.

I am appearing today on behalf of the National Ocean Industries Association (NOIA). NOIA represents more than 325 large and small companies across America that build and manufacture the vessels, equipment, and supplies, and provide the services and manpower necessary for minerals exploration on the OCS. These companies although not usually OCS lease holders or permittees are, nevertheless, directly affected by CZM policy. They are opposed to S. 1412 or any other legislation or regulation which would impede the development of needed offshore domestic energy resources.

I have been involved in OCS leasing policy and procedures for over eighteen years as a lawyer and an offshore contractor. I testified several times in both Houses of Congress during the debate over the OCS Lands Act Amendments of 1978 and in numerous oversight hearings which have been held on the OCS program since 1978. From 1979 to 1982, I served on the Coastal Management Advisory Committee in the U.S. Department of Commerce, and from 1981 to 1985 I was the offshore support industry representative on the Interior Department's Outer Continental Shelf Policy Committee. I have also served on the Interstate Oil Compact Commission as an appointee of the Governor of Texas since 1984. As a member of these bodies, I have had the opportunity to observe firsthand the procedures which the OCS Lands Act and the Coastal Zone Management Act of 1972 (CZMA) provide affected coastal states and various interest groups to input into the OCS leasing, exploration, and development process.

Because of my background in OCS and coastal management issues, NOIA asked me to represent the organization concerning the very serious matter before your Committee today—S. 1412. This bill would amend Section 307(c)(1) of the CZMA to require federal offshore oil and gas lease sales to be consistent with state coastal management programs. This would be accomplished by changing "directly affecting" to "significantly affecting." In addition, the proposed amendment would replace the phrase "consistent to the maximum extent practicable" with the phrase "fully consistent."

1984 SUPREME COURT DECISION

In our opinion, the proposed legislation is a clear overreaction to the ruling of the Supreme Court of the United States in *Secretary of the Interior et al* v. *California* issued on January 11, 1984. In that landmark case, the Court held that OCS lease sales as such are not activities "directly affecting" the coastal zone and thus need not be conducted in a manner consistent with state coastal zone management programs pursuant to Section 307(c)(1) of the CZMA. The Court reasoned, first, that the legislative history of the 1972 CZMA and its 1976 amendments demonstrates that Congress did not intend to apply Section 307(c)(1) to OCS leasing activities, and, second, that the 1978 amendments to the OCS Lands Act, which requires prior Interior Department approval of OCS exploration and development/production plans, so restructured OCS leasing that it cannot be held that the issuance of leases cause "direct" affects upon the coastal zone.

In no way does the Court's opinion lessen environmental protection of the coastal zone nor does it deprive the states of their role in OCS leasing. The National Environmental Policy Act (NEPA), the Clean Water Act, the Endangered Species Act, and a variety of other federal environmental statutes remain fully applicable to OCS leasing. Moreover, Section 19 of the OCS Lands Act, provides affected coastal state governors with the opportunity to make recommendations concerning the "size, timing and location" of OCS lease sales. Interior "shall" accept such recommendations unless they do not provide for a proper balance between state and national interests. Section 19 thus gives states significant authority to influence the OCS leasing process. The Court's opinion does mean, however, that states cannot invoke their CZM programs to restrict OCS leasing. It also means that state agencies cannot do what the California Coastal Commission sought to do in the early 1980's—invoke CZM programs to oppose leasing, notwithstanding the Interior Department's compliance with recommendations made by the Governor pursuant to Section 19 of the OCS Lands Act. In its most simple terms, what the Court's opinion does is deprive states of a veto authority to override Interior's decisions as to the selection of OCS tracts for leasing, and in so doing, it reaffirms that the federal government retains ultimate control over OCS lands outside the coastal zone.

INTERIOR DEPARTMENT INITIATIVES

Speaking to the Interior Department's OCS Policy Committee at a meeting I attended in January, 1984 just after the Supreme Court decision, former Interior Secretary William P. Clark responded to the decision in a conciliatory manner. He said, "We don't see it in terms of 'victory' . . . There should be no 'winners' or 'losers' in this process." And, he immediately expressed the Department's full intention to get together earlier in consultation with the states. Secretary Clark and his successor, Secretary Donald P. Hodel, kept that commitment. Since 1984 the Interior Department has revised procedures relating to OCS leasing to provide greater state and public participation in the program. Many more public hearings and scoping sessions are held to address local problems and sensitivities. Industry has been called upon to provide more comprehensive information beginning at the call for information stage so that potential conflicts can be identified earlier and OCS tracts lacking in interest from the standpoint of resource potential can be removed from areas to be offered for lease. At the same early point in the process, the Department has indicated how much it already knows about an area as the result of environmental studies already completed. In recent years, these steps have reduced the size of the geographical areas subject to environmental review by the states and subsequently offered for lease. The Department also publishes a planning milestones schedule to assist the states and local communities in planning their own process of review and comment on federal OCS activities.

NO NEED TO AMEND CZMA—STATUTE IS REALISTIC IN ITS PRESENT FORM STATES ARE ALREADY HEAVILY INVOLVED IN THE PROCESS

We see no need to amend the CZMA to make lease sales themselves subject to state consistency determinations. Regardless of the Supreme Court decision, the states have plenty of opportunities to be heard and to influence the outcome of federal decisions in the pre-sale and post-sale stages of the OCS leasing process. In addition to the opportunities which the Governors have under Section 19 of the OCS Lands Act, under the same Act lessees and operators are required to submit an exploration plan prior to commencing exploratory activities under a lease, and the Department of the Interior must act on it within thirty days from submission. However, even though the exploration plan may be approved within that time frame, no "license or permit for any activity described in detail" in such plan may be granted where an affected state has an approved coastal zone management plan unless the consistency requirements have been met.

Also, pursuant to HEPA, an elaborate and thorough environmental impact statement (EIS) is prepared by the Interior Department before each lease sale is held complete with attendant comments and public hearings on the draft EIS. Prior to this, informal scoping sessions are held with interested parties to identify potential conflicts. All these steps require at least 2 years to accomplish.

Many people, however, do not realize—or choose to overlook—that *after* a discovery is made, the Interior Department must go through the EIS process a *second* time in frontier areas before development is permitted to begin. This provides a second opportunity for affected states and other parties to comment and participate in public hearings covering potential local impacts. During the debate on the OCS Lands Act Amendments in 1978, environmental organizations said that this provision would eliminate litigation and opposition to the lease sales because it would provide yet another opportunity to balance resource potential with environmental risks *after* it became known from exploration drilling whether there actually was any oil or gas present in the area. The principle is still valid, but critics of the program have not ceased their opposition.

This is an important point for members of this Committee to consider and it really goes to the heart of this legislation. During the administration of former Interior Secretary Cecil Andrus, I was one of the lawyers who helped manage industry's intervention in litigation brought by coastal states and environmental organizations to block the first OCS lease sales in the Baltimore Canyo and Georges Bank areas. The experience of Atlantic offshore development stands as vivid testimony why you should not favorably report out S. 1412.

During the course of that litigation, millions of dollars were unnecessarily spent by the states, counties and environmental groups which initiated the lawsuits, and by the federal government and industry which defended them. These ations were brought to protect our coastline from the alleged risk of oil pollution long before it was known whether oil or natural gas resources were actually present in those areas. After several years of drilling in the Atlantic, we have nothing to show for our efforts but dry holes. The same scenario has been repeated with regard to federal OCS leasing on the West Coast of Alaska.

The plaintiffs in these lawsuits would have better served their constituents if they had held their fire until (i) they knew whether hydrocarbon resources actually existed in those areas, (ii) if such resources were present, whether they were oil or natural gas in commercial quantities, and (iii) armed with the foregoing information, they had a clearer idea of the potential coastal impacts and conflicts which might be brought about by development.

Advancing the consistency determination to the lease sale stage itself is even less justifiable when we consider the opportunities for coastal states' input and controls in the development stage. In addition to the second generic EIS, prior to proceeding with development activity a lessee or operator is required to file a development and production plan. This is in addition to the exploration plan mentioned previously. If approval of the development and production plan does not require a specific environmental impact statement, and affected state and local government has sixty days to review and comment on the plan, and the Interior Department must act on the proposed plan within another sixty days. However, again, even though approval of the development and production plan may be conferred within the time frame allowed—no license or permit may be issued for any activity called for where an affected state has an approved coastal zone management plan unless and until consistency certification has been obtained or if the state is conclusively presumed to concur with the consistency determination.

The lengthy and elaborate consultation and coordination procedures between the states affected by OCS leasing and the Secretary of the Interior have resulted in the deletion of many tracts and the addition of lease stipulations at the request of state governors in numerous OCS sales. With both sides acting in good faith, there is ample opportunity to resolve differences within the time frames provided in the Five-Year OCS Leasing Program and the planning milestones. Also, it should be remembered that, in many ways, a lease is only a license to apply for permits—up to 17 of them issued under 74 sets of state and federal regulations. Here again the states have numerous opportunities to influence OCS activities and assure protection of the coastal environment.

In the real world it makes much more sense to determine consistency with coastal zone management plans in the post-sale stage than it does in the pre-sale stage. The CZMA in its present form recognizes this. It recognizes the element of chance in offshore petroleum exploration and measures the need for state consistency determinations against the times when coastal impacts are more realistically predictable. If S. 1412 is enacted it will breed more litigation and perpetuate the waste and absence of realism which have characterized controversies over OCS leasing up to now.

REGIONAL IMBALANCE

We also want to make the important point that the proposed amendments to Section 307(c)(1) are certain to exacerbate the geographical imbalances in our OCS leasing program contrary to the goals of the OCS Lands Act Amendments of 1978.

Section 18 of the OCS Lands Act Amendments provides that there must be "an equitable sharing of development benefits and environmental risks among the various regions." In the context of this law, how can we justify the fact that over 97% of the wells drilled on the federal OCS to date are in the Gulf of Mexico? By contrast, how can we justify that today some 75% of the California OCS is off limits to oil and gas leasing and lease sales face numerous delays?

The last two administrations have adopted OCS leasing programs meeting their statutory obligations for regional balance. Enacting S. 1412 would empower individual states to use their coastal zone management programs to place local concerns about national interest and destroy whatever hope we have for achieving regional balance in our offshore leasing. It would also impede exploration drilling in OCS frontier areas. As petroleum resources continue to decline in the Gulf of Mexico, this will jeopardize the nation's energy security and further heighten regional political tensions over energy policy.

INTERNATIONAL PERSPECTIVE

I have just returned from a two-year assignment in London as managing director of an Anglo-American joint venture drilling company active in the North Sea. Being fresh from that experience, I cannot help but reflect on the international economic implications of this bill.

Since 1981 the active rotary rig count in the U.S. has fallen by 76 per cent, more than triple the rate for the rest of the world. In just one year, from 1985 to 1986, exploration and development expenditures declined by almost 40 per cent; and employment in oil and gas extraction dropped by 34 per cent. In fact, since 1982 over 300,000 jobs have been lost in America's oil producing states.

The oilfield service industry, which NOIA represents, collectively lost $5 billion in 1986 alone. And, it's not getting much better. In the first five months of 1987, 27 of 30 U.S. producing states experienced a decline in total production. Texas and Oklahoma calculate that 1987 will show the lowest production levels since World War II. Indeed, Texas expects average daily production in 1987 to fall below 2 million barrels per day for the first time since the War.

In the meantime, the rest of the world outside of OPEC is adopting national agendas to become more energy independent.

Moscow's Central Statistics Bureau reports that the Soviet Union had its oil production up to 12.3 million barrels a day in the first half of 1987. Natural gas, coal and electricity production also were up, which means that the U.S.S.R. probably will overtake the U.S. as the world's number one primary energy producer in 1987.

The Soviets are moving ahead to explore their vast offshore areas, and are accelerating technological development to boost oil and gas production in eastern and western Siberia. This summer the Soviet Ministry of Geology even reported it was conducting experimental nuclear explosions underground to extract oil from deep layers of rock.

According to information assembled by the Petroleum Finance Co. of Washington, D.C., from Europe to South America to the Far East some 26 non-OPEC member countries have recently altered government policies to foster increased production of hydrocarbons and develop a business climate to spur that production. A year ago this month Foreign Ministers of the European Economic Community met to approve new long term energy objectives for 1995. "Considering the major changes which have taken place in the oil and natural gas markets since 1980", the Ministers said in their joint agreement, "the more relaxed state of the markets has released some of the pressure. However, the change is not without danger. The temporary surpluses . . . together with pressure towards lower prices, could, in the short term, delay or undermine the decisions required to ensure that long term needs are covered. The effect of a depressed market on the situation of the energy industries could prevent investment." Conscious of the EEC's dependence on imports, the Ministers went on to say that, besides pursuing an efficient substitution and energy-saving policy, the Commission hoped that member states "will maintain suitably balanced legal and financial inducements in favor of prospecting for and production of oil within the Community. The Community shall also, in conjunction with other member states, examine the possibility of Community-level action to promote exploration for oil in new regions."

Long term United States energy policy is nowhere near as clear, and in this regard we are out of step with our energy producing allies. Moreover, our myopic energy policy has important consequences as far as trade policy is concerned. In the last thirteen years Americans have spent two-thirds of a trillion dollars on imported energy—more than the entire merchandise trade deficit for that same period. Yet, we continue to turn a blind eye on this important segment of our deficit and the opportunities that exist to bring it more into balance by adopting policies which foster more domestic energy production.

S. 1412 certainly can not be characterized as the kind of "balanced, legal, and financial inducement" the Europeans are initiating. On the contrary, it represents a legal and financial impediment which will only place the United States at a greater competitive disadvantage in attracting petroleum investment. Viewed in this broader context, NOIA sees S. 1412 as unnecessary and counterporductive legislation which would evaluate local concerns over national concerns, impede development of important energy resourecs, and further deteriorate our trade imbalance.

[The following information was subsequently received for the record:]

ROWAN COMPANIES, INC.
2470 FIRST CITY TOWER
HOUSTON, TEXAS 77002-6709

PAUL L. KELLY
VICE PRESIDENT

713/654-7081

October 21, 1987

The Honorable Pete Wilson
United States Senate
720 Senate Hart Office Building
Washington, D.C. 20510

RE: Follow-up to September 29
Commerce Committee Hearing
on CZMA

Dear Senator Wilson:

Upon conclusion of my September 29 testimony on behalf of the National Ocean Industries Association before the Senate Commerce Committee on coastal zone management issues, I thought it would be helpful to follow-up on some of the points you raised during your questioning. Hopefully, the enclosed comments will clear up any misunderstanding which might have arisen at the hearing.

By copy of this letter I am requesting Chairman Hollings' permission to include the enclosed remarks in the record of the hearing.

I appreciated the opportunity to appear before you and the Committee, and will be glad to respond to any additional questions you or members of your staff may have.

Sincerely yours,

Paul Kelly

Paul L. Kelly

COMMENT: FEWER RIGS OFF CALIFORNIA THAN IN THE GULF OF MEXICO BECAUSE OF WATER DEPTH, NOT BECAUSE OF MORATORIA

RESPONSE: While it is true that the continental shelf drops much more precipitously off California than the Gulf of Mexico, and that many of the prospective offshore basins are in waters close to shore, this does not justify why there is so little offshore activity off California, versus the Gulf of Mexico.

The reason for the lack of activity, which has led to a dramatic drop in petroleum-related employment in California, is the lack of offshore leasing and the problems associated with conducting exploratory and development activities on the California OCS. Because of Congressional leasing moratoria and sale delays, together with action Interior has been forced to take due to local pressures to delay, cancel, or minimize leasing, little leasing has occurred off the State. In fact, a lease sale off Northern California has not occurred since 1963. The last Central California sale offered only 137 blocks and resulted in the leasing of 8. Sale 80, in 1984, was the last Southern California sale and and resulted in another 25 blocks being leased. In total, of the 13,000 blocks off California, less than 3 percent has been leased. In contrast, at least two lease sales, covering large areas, are held every year in the Gulf of Mexico.

Leasing, by itself, does not generate much employment, nor does it produce energy for our nation. It is not until exploratory drilling and development that employment in the industry will be impacted. Here again, opposition to offshore activity has prevented, delayed, or limited many of these activities. The California Coastal Commission cites its high project approval levels, but their figures do not reveal the delays, additional expenses, and the number of projects never put before the Commission due to their lack of predictability and attitude towards offshore oil and gas activities.

These are the reasons why there is so little OCS activity in California versus the Gulf of Mexico, where 97 percent of all offshore wells are drilled. Despite its expansive coastline, offshore oil and gas activities have been centered in one area, the Santa Barbara Channel. Drilling could, and should, precede in many other areas along the coast where commercial quantities of hydrocarbons are believed to exist.

There will never be a "forest of oil rigs", as some contend, nor will there ever be as many platforms as in the Gulf of Mexico. But, there certainly can be more leasing, more drilling, and more production off California. This would certainly help the employment situation of our industry in California.

COMMENT: PETROLEUM INDUSTRY EMPLOYMENT LOSS IS DUE TO DROP IN WORLD OIL PRICES

RESPONSE: It is true, the drop in the world price of oil has significantly affected employment in the petroleum industry, especially in the major producing states, such as California. Our point is, why make a desperate situation even worse by severely limiting offshore leasing? At a time when domestic production is dramatically falling, our government should be encouraging energy development, not restricting it. Our government should also be ensuring that our domestic petroleum infrastructure remains viable, so we can carry out that development. Since offshore California offers one of the best, if not the best, places to find significant amounts of hydrocarbons in the lower-48, economics dictates, especially now when the price of oil is low, that companies focus on only the best prospects, like California, for finding oil and gas.

Senator KERRY. Well, let me kind of come to the question, if I can, on this because I think it is interesting. I listen with enormous interest and respect, as I know where you are coming from. And yes, everything you said about the oil problem in terms of increased dependence on imports and a lack of new drilling, is true. I don't disagree with that. And I am concerned about it. You may not think so, but I am concerned about it. If we are going to talk about competitiveness in this country and we are going to be less dependent and more security conscious and a whole lot of other things, sure, we have got to drill.

But let me give you an example. A few years ago the Interior Department put bids out on the Georges Bank. Not one oil company responded to that bidding process. Do you know who put in the only bid? Greenpeace was the only bid. Why are we going through this?

Maybe you can explain this. Can you tell me why that was if this such a rich and important oil location?

Mr. GHYLIN. I could not answer as to that specific sale, but I can tell you that in many of our sales the accumulation of information to prepare for the sale is a very expensive operation that various oil companies go through in preparation for the sale.

In many areas—and I think Georges Bank and northern California probably qualify—we have been doing and redoing that information for the last 15 or 20 years. Many of the companies have totally lost interest or have given up on the idea that any of the potentially valuable land will ever be available for reasonable development, and consequently have gone elsewhere.

During the last 6 years, we have not had a sale off of California. And our off-shore exploration industry has departed. It is now in China and Peru. And when that happens, you have a change in views at any one point in time.

Mr. KELLY. Mr. Chairman, may I answer that question as well?

Senator KERRY. Sure.

Mr. KELLY. I think that what happened is that we had a first round of exploration in the Georges Bank, and as you are well aware, we came up with nothing but a series of dry holes. Therefore, the industry interest has been dampened. However, this doesn't necessarily mean interest will be dampened forever. I think what will happen is that the leaseholders will now go back home and redo their geophysical and geological analysis. And you may well find them coming back later with some new ideas.

My company is currently drilling off shore in Nova Scotia which, as you know, includes part of the Georges Bank area. And companies exploring in that area—in shallow waters, incidentally, under 300 feet—have made some interesting gas and oil discoveries. This could also cause some reevaluation of the Georges Bank area of the U.S. OCS.

The Georges Bank experience provides a good illustration of why the proposed legislation is not a good idea. Mr. Bruce and I were both involved in the Georges Bank litigation during the 1970s. The Commonwealth of Massachusetts, various environmental organizations and local government bodies spent millions of dollars on that litigation prior to the time that we actually knew whether any oil and gas actually existed in the area. If they had held their fire until the first round of exploration had taken place, they wouldn't have wasted those valuable resources and probably would have served their constituents better.

Senator **Kerry**. Well, I think we could argue about that.

The point I am trying to make here is that I am concerned that what we are trying to set up is a process that fully guarantees.

Have you read the CZMA of 1972, explaining why we set it up? If you reread that, the congressional findings, national interest, an effective management, beneficial use, protection and development of the coastal zone, "Rich in a variety of natural, commercial, recreational, ecological, industrial, aesthetic resources of immediate and potential value to the present and future wellbeing of the Nation. The increasing, competing demands upon the lands and waters of our coastal zone occasioned by population growth, economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation, navigation, waste disposal, harboring of fish, shellfish, other living marine sources have resulted in the loss of living marine sources, wildlife, nutrient rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion. The coastal zone and the fish, shellfish, other living marine sources"—so it goes on. I am not going to read the whole thing, but you will see that Congress made some very specific findings in 1972. And Congress said we want to protect this, and balance it with development. Believe me, I want to balance it with development.

And you know, Massachusetts sometimes gets rapped for being tough on some of those things, but somehow we have got the lowest unemployment in the United States of America, the biggest boom and the highest rate of personal income growth today. We are doing pretty well. And I think that all we are trying to do is come up with a balance here.

Now, no one is trying to create a bill here—certainly not me—that gives the State a veto power. But we do think that the process ought to allow for consideration of how this may affect it. In a very close Supreme Court decision, 5 to 4, four justices, including Justice Stevens writing the opinion with Justice Brennan, and a couple of others in dissent with him, said they don't believe that it is possible to allege that drilling off the shore can't directly affect the zone.

Now, the Interior Department conducted an environmental impact study. I happen to be referring to the Georges Bank, but they predicted that approximately 10 spills could occur within a 30 year period, 10 spills equaling more than 1,000 barrels per spill, or a total of 10,000 barrels of oil would be spilled.

Now, Woods Hole Marine and others have come up with studies that show that if that happened, and this the prediction of the Interior Department, it would have an impact. It is going to hit the shoreline, and it is going to hurt the fishing industry. The fishing industry comes off our shorelines, as part of our coastal zone interests.

All we are saying is why can't the process allow for consideration of how we are going to guarantee that the technology, the drilling, all of these things are going to be consistent with that plan. That's all we are looking for.

Mr. Bruce. Senator, may I respond to that because I——

Senator Wilson. Mr. Chairman?

Senator Kerry. Yes.

Senator Wilson. Mr. Chairman, at the risk of being rude, and I don't wish to be, I am under some time pressures. There is a quorum call in progress now—a delay that has been initiated awaiting my arrival on the floor to present an amendment.

Senator Kerry. Go right to it. We'll come back.

Senator Wilson. Let me make a comment and ask a question.

I heard just enough as I was coming in to really think that a rather false impression is being given of the situation in terms of the California OCS development.

There have been lease sales, 73, 80. I am advised that 6 to 15 new platforms, as a result of those, will be going in off the California coast some time before 1995, and that in fact the production is expected to quadruple.

Mr. Kelly, let me ask you a question. You cited a statistic that said that between 1980 and the present time 55 percent of the personnel involved in off-shore production off California have gone. How many have left in the past 2 to 3 years?

Mr. Kelly. Senator, we have been unable to determine that because while we returned to survey the same 37 companies that we surveyed in 1985, we could not find very many of those 37 companies. They were out of existence or moved. So, there has been considerably more in the way of layoffs and of personnel moves that have occurred in the last two years.

Senator Wilson. Do you have any statistics that would compare what the reduction in employment has been in the oil patch?

Mr. Kelly. In general? Yes, I have——

Senator Wilson. Not in general, no. Specifically. I want to compare apples with apples.

Mr. Kelly. Yes, I have that in my statement. And I think I mentioned that just before you walked in. One moment here.

Senator Wilson. Well, the reason I ask, obviously, is because my colleagues from Texas and Oklahoma and Louisiana have made a rather poignant case for their States——

Mr. Kelly. Yes.

Senator Wilson [continuing]. Arguing that they are in deep economic trouble.

Mr. Kelly. That's right.

Senator Wilson. And that, of course, has not been occasioned by their hostility to off-shore drilling. It has been occasioned by the international economics of oil production.

I wonder if some of those same factors may not be at play in terms of what has happened in California.

Mr. Kelly. They definitely are, but it is not completely the reason. The industry-wide figures are that employment in oil and gas extraction in general has dropped 34 percent. We have lost about 300,000 jobs nationwide. Now, those companies in California reporting during that time frame reported a 55-percent decline.

Now, if I could just share with you an experience from our company. We had a drilling rig located in California 3 years ago. We moved it there from Alaska hoping to participate in oil and gas exploration. The rig was reviewed by the California Coastal Commission in connection with an exploration plan presented by one of the oil company operators. And actually the rig received a commendation from the Coastal Commission as being the type of rig that the Coastal Commission would like to see operating off shore California because of its environmental safety features.

However, after remaining in California for 2 more years without being able to get work, we had to leave and bring the rig back to the Gulf of Mexico. During the early 1980s there were only six or seven mobile off-shore drilling rigs located off shore California. This is not a large number considering the size of the area and when compared to over 200 rigs located in the Gulf of Mexico at the same time. The number of offshore rigs in California has declined to even less than that today.

Senator Wilson. Mr. Kelly, doesn't that have something to do with the depth of the water in which they operate?

Mr. Kelly. Not particularly.

Senator Wilson. Well, then we have been misled because we have been told time and again by the Department of Interior that the necessity to develop a leasing plan that has tracts flush up against the State three mile limit in many cases is because it is essential to be that close in to deal with a very steeply descending outer continental shelf off California in contrast, we have been advised, to the rather shallow waters that are far more economically operable in the Gulf of Mexico.

Mr. Kelly. I'm not sure I understand the point. But basically——

Senator Wilson. The point is very simple. We have been told the necessity to push these tracts right up against State waters in California is in order to reach a depth—or I should put it conversely—a shallow water situation that will allow for the economic extraction of oil. We are told, for example, that the tracts that were contained in an earlier agreed upon version of a leasing plan, one in which the California congressional delegation and the Secretary of the Interior were in agreement, that a number of these were uninteresting to the oil companies because they were simply too far out. The water was too deep.

Mr. Kelly. Mr. Ghylin may wish to elaborate on this further. But basically we who do the drilling are prepared to go where the resource is located, and resource location is not determined by water depth. Water depth does have an impact on cost, however. The industry has both floating drilling rigs and bottom-supported drilling rigs that have operated off shore California, depending on water depth, and it has the technology to drill in either shallow or deep waters.

Senator Wilson. Well, I wish you would share that with the Department of Interior because in their communications to us, they have seemed unaware of it.

Thank you, Mr. Chairman.

Senator Kerry. Thank you very much.

Mr. Bruce, you were about to respond.

Mr. Bruce. Yes. Responding to your remarks, Senator, and implicit in Senator Wilson's remarks as well, there is a process. It was advocated by the States of Massachusetts and California. It was led by them through the Congress after 4 years, culminating in the 1978 amendments to the OCS Lands Act. And that consultative process for State input has worked much, much better than I think you have been led to believe.

Let me tell you about sale 73. Senator Wilson mentioned it. Sale 73 did go forward. That's right. It would not have gone forward had section 307(c)(1) applied to lease sales because the Coastal Commission stated it was totally inconsistent with the California program for that sale to go forward.

Now, what is important about that is that prior to the Coastal Commission taking that point of view, Governor Deukmejian and Secretary Clarke, I believe it was, entered into long, detailed negotiations culminating in a memorandum of understanding as to how that sale should proceed. The governor's concerns were totally satisfied. The sale was reshaped in the way the governor said it should be. Notwithstanding that fact, the Coastal Commission went to court unsuccessfully, as it turned out, to get an injunction.

We have had things like that happen in Massachusetts too, Senator Kerry. In the first Georges Bank lease sale, sale 42, which was held in 1979, the Secretary of the Interior, who was then Secretary Andrus, agreed with Governor Dukakis to delete 23 of the 24 tracts that the State of Massachusetts wanted taken out of the sale. He also agreed to impose mitigating measures that the State wanted of a vast sort. Notwithstanding that almost total agreement with the State, the State sued to enjoin the entire lease sale, ultimately unsuccessfully.

Much the same thing happened in sale 52, which was the next Georges Bank lease sale. We then had Secretary Watt in office, and again I believe it was Governor Dukakis in the State House. The Department of the Interior took out half of the tracts that the State of Massachusetts wanted out. They added most, if not all, of the lease stipulations that the State wanted. Nonetheless, because Interior had not acceded to every single one of the State's demands, it sued for an injunction.

Now, there has been cooperation on the Federal side. The Federal Government has often gone more than half way to meet the States. With Governor Deukmejian it went all the way, and he was satisfied. With Governor Dukakis it often went 95 percent of the way, and he wasn't satisfied.

What is at issue here is not process. It is not input. There is ample consultation. It's not balance. There is balancing, careful balancing, as Mr. Bettenburg described. What is at issue here is a request by the States that they, through their CZMA administrations, have the final call in defining the national interest. That is what is at issue. That is why this is important. It is not a process. It's a substantive statute, and the State wants the substantive power to dictate the terms of leasing through their programs.

Senator KERRY. In a sense—I mean, that's a very fine answer. And I know you represented the industry before the Supreme Court, and you have been very involved in this for a long time. And you know it well, better than we, I am sure.

But it seems to me that there is a presumption there that the States are automatically, with the exception of Georges Bank, because I think it is a special kind of situation, in any circumstances, at any time under this language, able to preclude drilling from taking place. I don't see how you get from that point to where you are.

The language in fact does not change the process. It merely reinserts the drilling oil lease decision, putting process back into the consistency review. That is what it really does.

Mr. BRUCE. Senator, if it were merely a matter of more State input, and more state access to the process, and more consideration of State's views, we would not be here this morning.

Senator KERRY. Well, I understand your fears about it.

Mr. BRUCE. It is more than fears. These are the litigating positions that the states have consistently taken when they come to court.

Senator KERRY. But you have not been able to drill. I mean, it is not as though the process has somehow precluded you.

I mean, has California actually stopped you from any particular project?

Mr. BRUCE. Yes.

Senator KERRY. Other than the moratorium?

Mr. GHYLIN. Yes. They have delayed, refused, hindered, and stopped.

Senator KERRY. Which projects did they stop?

Mr. GHYLIN. Well, let me just start with one, the St. Inez project, which was where oil was discovered in 1969 by Exxon, 1 year before oil was discovered in the North Sea.

By 1980 Norway and England were both self-sufficient in energy and exporting oil to the United States, and we were still waiting for the first permit for St. Inez. That conflict is still going on.

Senator KERRY. Could I ask you this? Did they do that by virtue of the consistency authority?

Mr. GHYLIN. Yes. Partly. It was directly involved. And under the consistency authority in my company's case, the Coastal Commission precluded the drilling of exploratory wells.

Senator KERRY. Are you referring to the platform Gail——

Mr. GHYLIN. No, I have not. But I would if you would like. I am referring to——

Senator KERRY. I did not know whether you were going to include that one in there.

Mr. GHYLIN. No.

Senator KERRY. Because I thought that there was a distinction.

Mr. GHYLIN. Gail is in place. So that was not precluded. It was hindered and delayed, but not precluded. But we have an exploratory plan that was denied, and appealed.

Mr. BRUCE. And Senator, on lease sales themselves, which is what we are really talking about today, the only reason that these sales were not stopped by the states' lawsuits was because the Supreme Court ultimately held that the states could not apply (c)(1) at the leasing stage.

Prior to that holding by the Supreme Court, the lower courts had granted injunctions based on (c)(1), and they were granting those injunctions because the states were saying, not we need more opportunity to discuss this matter, not we need more opportunity for consultation.

The States were saying, it was California that was saying this, you did not do it our way, and if you do not do it our way you cannot do it at all.

And we had those injunctions defeated because the Supreme Court, after lengthy, of course, consideration of the statutory intent, going deeply into the legislative history, concluded that (c)(1) does not apply.

Senator **Kerry**. Let me ask you this. If the language were different here, would you have a problem with the term significantly affecting.

What if we were to change the language so that what was significantly affected was more narrowly defined in a way that did not open up Pandora's Box to litigation, but specifically targeted towards quality of environment, human environment, whatever, and we narrowed it somehow?

Do you think there is a way to do that that could make this acceptable?

Mr. **Bruce**. I do not believe so. Not if your intent is to give states the authority at the leasing stage to call a halt to these projects.

Senator **Kerry**. But, let me come to that now. When you say, to call a halt, it is your determined and unchangeable view, then, that as long as oil gas leases are part of the consistency process, you believe the states have the veto. Is that what you are asserting?

Mr. **Bruce**. I believe, Senator, that if the statute is changed in the way they would like to have it changed——

Senator **Kerry**. Well, now, let us say we just went back before the Supreme Court decision of 1984——

Mr. **Bruce**. Exactly.

Senator **Kerry**. Let us say directly affecting is permitted to include gas and oil.

Mr. **Bruce**. That is the way the lower courts read the statute, most of them. And you know how many lawsuits we had filed by States in that regime? We had about 10.

Senator **Kerry**. Yes, but lawsuits are not a veto.

Mr. **Bruce**. Well, they are a way of enforcing substantive rights. You see, this statute is not NEPA. NEPA says——

Senator **Kerry**. But they are a way of enforcing the law of the country.

Mr. **Bruce**. But the statute says——

Senator **Kerry**. Which I gather you feel is simply not conducive to a balance, as we have been talking about here between the interests.

Mr. **Bruce**. No. To the contrary, I think the statutory scheme now provides for a very refined balancing, and it has been carried out properly.

My point is this. Section——

Senator **Kerry**. But the statutory scheme now totally excludes oil and gas leases from consistency considerations.

Mr. **Bruce**. The section 307(c)(1) does. But you have to look at the entire picture.

You have 307(c)(3), which clearly applies to all those parts of the process that will have any effects on the coastal zone.

You have section 19 of the OCS Lands Act, that gives us very full, guaranteed opportunity for input by the states to the Secretary of the Interior that has led to the kinds of things we have had in California and Massachusetts.

You have to see the entire picture. Section 307(c)(1) itself, the operative word in that section really is "shall." Federal activities directly affecting the coastal zone shall be conducted in a manner consistent with state programs.

That gives the states the right to make the argument, and they have consistently made it, that if you do not shape these sales the way we think you should, you are violating Federal law, and we can enjoin you from going forward.

They have tried to do it on, I believe, 10 occasions before the Supreme Court clarified the law. Those were the guerrilla warfares that Mr. Panetta was describing. I know that guerrilla warfare because I was very much in the midst of it.

Since the Supreme Court clarified the meaning of the statute, we have not had those CZMA-based lawsuits. Instead, we have had the section 19 process, we have NEPA, we have the Endangered Species Act, we have everything else bearing upon this.

Some suits have been filed under those statutes. But we have had less litigation than we had before. And if you pass this legislation in its present form, I can promise you you will have more litigation than you have now.

Senator KERRY. Do you promise that with the same assurance, I do not mean to be coy, that you talked about a parade of horribles in that original letter, about things that would happen? Do you remember that?

Mr. BRUCE. Are you talking about my letter on the parade of horribles?

Senator KERRY. Yes. To the Chairman of the House Merchant Marine and Fisheries Committee.

You said, people, I think it was California specifically, and people were referring to what was going to happen as a result of the decision. And you said, no, the decision is very, very narrow. The decision only applies as to oil and gas.

And now, here we are, with the confusion that I have articulated today, where we have seen that it has been extended beyond that as a result of the Hudson case, et cetera.

So, in fact, the assurance that you made that it was very narrow has not held up.

Mr. BRUCE. Well, my reading of the Supreme Court's decision remains the same as it was then, and that is, it was a very specific application of the statute to a specific set of facts.

I do not think that some of the parade of horribles that were paraded out at that time, which were, for example, putting toxic wastes 3.1 miles off the coast of California, that kind of inflammatory thing——

Senator KERRY. Sure, I agree. I think that is inflammatory.

Mr. BRUCE. That was a red herring, to use your phrase.

Senator KERRY. The point I make is, that you referred to your own testimony, and Carol Dinkins' testimony before the Committee, and I quote her.

> There is now virtual unanimity amongst the most directly concerned parties to the Supreme Court case that its holding was a narrow one that does not exclude

CZMA review of such things as the disposal of toxic waste through nuclear submarines off the coast, and so forth.

But in fact the Department of Justice, the Interior, and Commerce have now shown that the decision is being extended to ocean incineration of toxic wastes, designation of ocean dumping sites, and so forth.

So there is not virtual unanimity. And that is precisely the problem that has brought us here.

Mr. **Bruce**. If the Senate wants to clarify this statute so as to make it unambiguously clear, that things which are done outside the coastal zone in fact directly affect it, then I have no problem with that. I do not think my clients have any problem with it.

It is very clear, however, that such a clarification would not extend this statute to OCS leasing. That is what we are here to talk about today. And that is what I still strongly believe.

Senator **Kerry**. OK. Well, I appreciate it. And you have made your case well.

And you know, again, I think there a lot of other reasons, incidentally, on the question of why we have an energy problem today, which would bring us into a whole different subject, and a lot of us in the Congress feel very strongly about it.

We do not have an energy policy, to start with, and that is perhaps the first problem. And I share your concern about this. I just do not want to see another law and another set of important intentions and goals not allowed their opportunity to have a process, as I refer to it.

And again, I understand your fears. But maybe there is a way to work on this. And let us see if we can proceed forward. Thank you very much. I appreciate it.

Let me ask Richard Delaney if he would come up with his panel. And I appreciate your patience, all of you. We have gone a little bit over here. We will try to move it along.

Mr. Delaney, I think you are the only one testifying. Am I correct?

STATEMENT OF RICHARD F. DELANEY, CHAIRMAN, COASTAL STATES ORGANIZATION, ACCOMPANIED BY PETER DOUGLAS, EXECUTIVE DIRECTOR, CALIFORNIA COASTAL COMMISSION; AND STEPHEN SNYDER, DIRECTOR OF PLANNING AND CERTIFICATION, SOUTH CAROLINA COASTAL COUNCIL

Mr. **Delaney**. That is correct, Senator.

Senator **Kerry**. OK. If you would go ahead, and you are accompanied by Peter Douglas and by Stephen Snyder. We appreciate your being here, and we appreciate your patience. I am sure you have a lot you would like to respond to. So why not go right ahead.

Mr. **Delaney**. Thank you, Senator. It is good to be here again and to see you once again.

Peter Douglas is here with me. As you know, he is the executive director of the California Coastal Commission. And Stephen Snyder, who is on my left, is the director of Planning and Certification for the South Carolina Coastal Council. As you know, I am the director of the Massachusetts CZM program.

But I am also here today as the chairman of the Coastal States Organization. And that organization is composed of the Governors' representatives from 35 coastal states, Great Lakes States, Commonwealths, and U.S. territories.

We have an office here in Washington and are very much involved in national legislation concerning the oceans and the coast.

We have submitted written testimony that strongly supports Senate bill 1412, which, of course, describes in greater detail more of our recommendations and our support. I would like to take my oral 5 minutes now to describe the day-to-day situation that we are all living with as practitioners of coastal zone management back in the states.

What is clearly happening is what you have already described in your comments this morning. There is a significant erosion of the Federal consistency mechanism on several fronts throughout all our coastal states.

And it goes well beyond just oil and gas lease sales. A lot of the discussion this morning has been focused on the lease sale aspect of Federal consistency with State CZMPs.

But we are here to express a concern that since the 1984 Supreme Court decision, and because of instances involving the Justice Department, the Office of Coastal Resource Management, and other Federal agencies, that logic, or illogic, if you would, from the Supreme Court decision, has carried over into many of our other activities.

Just to cite a couple examples, and then move on quickly, Federal agencies such as the Army Corps of Engineers have used a broad interpretation of the Supreme Court decision to geographically define of directly affecting in order to justify or to state in their proposed dredge and fill regulations that there need not be consistency when the dredge and fill project is outside of the coastal zone.

In a second situation, and you have referenced this case before, the *North Carolina* v. *Hudson* case, the Army Corps again referred to that land boundary, and expanded, however, the restrictive interpretation by saying that it also applies to 307(c)(3) permits.

In our State we have an example where the Government Services Administration sought to dispose of, or to relieve themselves of, the ownership of some 170 acres of property on Nantucket.

In this instance GSA chose to ignore the coastal zone management consistency process, again citing the Supreme Court decision, saying that this is just a paper transaction that will have no direct affect on the coastal zone.

It does not take too much forethought to see that, whether they sell those 170 acres to a condo development corporation or to the town for conservation, transferring ownership of the land will clearly have an impact on the coastal zone.

Other Federal agencies are also clearly slipping. The Justice Department itself is promoting, in fact dictating to other Federal agencies, a very narrow and restrictive application of the Federal consistency process.

You need only look at Mr. Hookano's testimony, as he submitted it today, to see the interpretation that the Justice Department has been supporting, again referencing the landward boundary, talking about land transactions, whether they be, or other transactions such as lease sales being paper transactions that do not have direct effects and should not be included under Federal consistency.

It goes on further to talk about the Ocean Dumping Act preempting coastal zone management and Federal consistency review. All of these things will cause tremendous disruption to the sound practice of coastal management in our States.

The third area where we are finding tremendous difficulties is with the Office of Ocean and Coastal Resource Management itself.

I just returned, as did Peter Douglas, from a meeting in North Carolina where Peter Tweedt, one of the former witnesses today, and other officials representing his office distributed the Justice Department's testimony for this hearing, and announced that that testimony would henceforth be the policies of the Office of Coastal Resource Management as they apply to Federal consistency.

So here is a wholesale adoption by our parent agency of this particular view of Federal consistency. We certainly have become accustomed to no advocacy or support from that office. But we certainly had hoped that they would at least debate this issue a little further before acquiescing.

Peter Tweedt also indicated this morning that his office has not gone any further with a weakening of the provision in their correspondence with the states over specific decisions.

And yet, and I guess he characterized most of that correspondence as just technical clarifications on how to conduct the process.

But in fact, what they distributed at this same meeting was a package of correspondence, including a letter to the California Coastal Commission, which said that because the Commission had not properly described the appeal process or fully articulated the reasons for a denial of a permit, these processes were, in OCRM's judgment, not quite fully described and not technically appropriate.

OCRM then made the leap forward to say that the Commission's denial was invalid and notified the applicant that they could proceed. That is a quantum leap from technical assistance.

This is just another example of what, I think, has become a combined and orchestrated effort to, undermine what should be, and has been, for the most part, a fine cooperative decision-making mechanism—the Federal consistency provision.

I will not review our comments in detail here. We do support S. 1412 and we feel that defining directly affecting in terms of significantly affecting is appropriate. We are comfortable with that.

We think it does bring clarity. And most importantly, it reestablishes the causal basis, as opposed to the geographic basis for our decisions.

We think fully consistent is appropriate. It basically codifies the regulatory language that is already in operation under OCRM's regs.

However, we are somewhat uncomfortable with including an exemption for fisheries plans. We think, in principle, that it is probably not good practice to initiate a strong principle with the possibility of a series of exemptions. Furthermore, we have not seen major problems in this area.

We work very closely and cooperatively with our fisheries people in the states. And other than a couple of small problems in Florida that have been worked out, we see no need to fix something that is not broken.

We strongly object to the characterization of the State consistency system as a veto. That is clearly not the case. What it does set up is a very fine, formal negotiating, discussion forum, within which all parties, states included, can have a significant say in Federal actions.

The success record on that is clear—97 percent of the actions we review ultimately get approved, and the projects go on in a higher quality state.

Lastly, I will close and take some time for questions, Senator. But I think the basic message from the Coastal States today is that S. 1412 is critical. We have been before you on this issue on several previous occasions.

During my last appearance I mentioned many of the possible events that would happen as a result of the Supreme Court decision.

My message today is that those events, are in fact happening, and that it is important for your Committee to take the lead, make the decision, and provide us with the clarification we need.

[The statement follows:]

TESTIMONY OF

RICHARD F. DELANEY

CHAIRMAN
COASTAL STATES ORGANIZATION

Before the

NATIONAL OCEAN POLICY STUDY
and the
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

September 29, 1987

Mr. Chairman and Members of the Committee, I am Richard Delaney, Chairman of the Coastal States Organization (CSO) and Director of the Office of Coastal Zone Management for the Commonwealth of Massachusetts. On behalf of CSO, a representative association for the governors of the 35 coastal States, Commonwealths and Territories, I appreciate the opportunity to present our views on S. 1412, legislation to amend the consistency provisions of the Coastal Zone Management Act (CZMA).

Mr. Chairman, the governors' delegates to CSO are especially appreciative of your scheduling this legislative hearing on a matter all too familiar to many members of this Committee. Since 1972, this Committee has taken several actions with respect to the consistency provisions of the CZMA, and has spoken out on their importance to the integrity of the 29 federally-approved State coastal management programs. The most recent Committee action was in late 1985, when it approved legislation authored by then-Chairman of the Committee Senator Packwood. As you are no doubt aware, the legislation which is the subject of the hearing today, S. 1412, is identical to that bill.

We appreciate the willingness of this committee to revisit this issue -- a complex, yet critically important component of the national coastal management program.

The CZMA was designed primarily to help States develop coastal management programs, subject to federal approval, that would weigh the demand for increased development against the need to conserve and protect the lands and waters along the 95,000 miles of U.S. coastline. To encourage State participation in this voluntary federal program, the CZMA provided the States with two incentives -- federal grant assistance, and the "consistency" provisions which assured participating States that their coastal management plans would not be preempted by conflicting or opposing federal action. The CZMA thus formed the basis for a carefully constructed partnership between the States and the federal government.

By and large, the history of the consistency process has been a success story. Over the last 15 years that the "Coordination and Cooperation" provisions (section 307) of the CZMA have been in effect, upwards of 97% of all federal agency 307(c)(1) consistency determinations have been concurred with by the States. Although the track record of 307(c)(1) consistency concurrences has been an excellent one, and the resolution of initial non-concurrences also good, we are seeing a trend of problems occurring over federal activities that "directly affect" a State's coastal zone. The term "directly affecting" in 307(c)(1) is not defined in the Act, nor in the regulations. Nonetheless, this lack of clarity did not present problems until the U.S. Supreme Court gave its judicial interpretation of "directly affecting" as a geographical term, rather than what we believe Congress originally intended -- a causal effects term.

In Secretary of the Interior v. California, the Supreme Court stated that "Section 307(c)(1)'s 'directly affecting' language was aimed at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act." 464 U.S. 322. This language has created a great deal of confusion as to exactly what section 307(c)(1) now means. What started out as a question of whether oil and gas lease sales fell within the scope of 307(c)(1) has become a much larger question. This is so even though the Justice

Department's original "narrow" interpretation of this case in 1984 was that only OCS lease sales were involved with this Supreme Court decision. This interpretation, as delivered by Assistant Attorney General Dinkins, was relied on by the States during the reauthorization of the CZMA in 1985. Unfortunately, however, federal agency policies and legal positions have not adhered to this administration policy of 1984.

Since the CZMA reauthorization 17 months ago, we have observed an orchestrated effort by various federal agencies challenging States' consistency authority based on a very broad reading of the Interior decision. What the States now confront is not only the exclusion of OCS lease sales from 307(c)(1) review, but challenges from federal agencies that their activities occurring outside of the coastal zone -- both landward and seaward -- are likewise exempt from section 307(c)(1). What's more, the Supreme Court's language concerning 307(c)(1) is also being applied to federally licensed or permitted 307(c)(3) activities.

For example, the Army Corps of Engineers has relied on this case to propose regulations that Corps dredge and fill operations must be consistent only when the Corps' dredging or disposal occurs "within a State's coastal zone," not when the dredging or disposal occurs seaward of the coastal zone. (51 Fed. Reg. 19699). The Justice Department, in North Carolina v. Hudson, relied heavily on the Interior decision to argue that the Corps' issuance of a "404 permit" without requiring the applicant to certify that the project was consistent with North Carolina's CZM program did not violate section 307(c)(3)(A) because the project took place "wholly outside of North Carolina's Coastal zone," i.e. landward of the Coastal zone. The Justice Department's view in this 307(c)(3) case is that any effects an activity outside the coastal zone may have on land and water uses in the zone are irrelevant.

There are more examples of this expansive and expanding interpretation of the Interior case by the federal agencies. But these two serve to show that the consistency review authority of the States is being challenged for activities far beyond just oil and gas leasing.

If these challenges by the federal agencies go unchecked, based on the Administration's current broad interpretation of the Interior decision, the result will undoubtedly be an unraveling of Congress' original intention under the CZMA, undermining the effectiveness of the federally-approved State coastal management plans. The States need clarification as to what activities Congress considers to be within a State's consistency review authority. Otherwise, confusion -- shorthand for litigation -- will continue to surround federally conducted activities that take place outside of the coastal zone. Ocean dumping, ocean mining, timber sales, water diversions, and federally sponsored ocean incineration could, for example, occur within one inch of a State's coastal zone without any consistency review being required, regardless of State interests or concerns or whether these activities could adversely affect the coastal zone's natural resources. If this all too real scenario occurs, it would be a mockery of Congress' clear, initial intent of effectively protecting and managing the Nation's coastal resources.

We are familiar with the argument that an OCS lease sale is only a paper transaction which has no effect, let alone a direct or significant effect, on the coastal zone. But this argument is as persuasive as saying that signing a check doesn't directly effect a bank account. All parties concerned with the check know that eventually that bank account is going to be effected. And the time to think about whether there is sufficient funds to cover the check is at the time of signing it, not later on.

The notice of sale is the primary planning and development decision which determines the scope and location of the ensuing activity. A lease sale is akin to subdividing the OCS and creating a right to develop that leasehold. Further, the location of support facilities and the choice of transportation methods are greatly influenced by the lease sale. OCS leasing sets in motion an entire chain of events that invariably leads to oil and gas development. Not including lease sales under 307(c)(1) diminishes the ability of a State to protect its coastal zone and to influence activities that were set in motion at the lease sale stage. This places the States in a charged atmosphere of having to determine the consistency of exploration and development plans after substantial amounts of money have already been paid by the companies. A corresponding effect is that the companies themselves are placed in a more risky position, financially speaking. We can only wonder if the woes of Platforms Gail and Julius in California would have been far less if the States had entered the consistency process at the time of the sale of the lease.

The rendering of the term "directly affecting" to a geographic term in the dicta in the Interior case has also generated the need to clarify that other federal activities are potentially within the scope of section 307(c)(1). It simply does not make sense that the activities of licensees or permittees conducted outside of the coastal zone must be consistent with a State's CMP, when federal activities outside of the coastal zone need not be consistent. The impacts are the same. For example, the effects on land and water uses within a coastal zone are the same whether the Corps disposes of its dredge spoils just outside of a coastal zone, or whether the Corps permits someone else to so dispose of the dredgings.

We believe that it was the clear, original, intent of Congress when 307(c)(1) was enacted in 1972 that all activities of federal agencies, whether conducted inside or outside of the coastal zone, had to be consistent to the maximum extent practicable if the activity directly affected land or water uses in the coastal zone. We believe that Congress also intended that all federally licensed and permitted activities occuring outside of the coastal zone had to be consistent if they affected land or water uses in the coastal zone. Dicta in a federal court decision should not be allowed to reverse these clear congressional policies. The result would be a severe erosion of the ability of States to protect their coastal resources, and an illogical limitation of the congressionally designed national coastal zone management program.

The confusion generated by the Interior v. California case can only be resolved by legislation. Following the Interior v. California decision, NOAA promulgated a new rule that strictly interprets the decision and excludes only OCS oil and gas lease sales from section 307(c)(1). Nonetheless, the Supreme Court's interpretation of "directly affecting" as meaning "within" a State's coastal zone, its rejection of any cause-and-effect interpretation of the term, and the confusion as to whether the court was speaking to only OCS lease sales or all federal activities continues.

For these reasons we applaud the leadership demonstrated by the members of this Committee by introducing S. 1412. This bill clarifies, or perhaps more correctly -- reclarifies, the intent of Congress to include all federal agency activities within the scope of 307(c)(1), regardless of the geographical location of the activity. Once again the focus is back on the effects of the activity. This is the only logical way to have a national program designed to fully protect the country's coastal resources.

At this point, I would like to direct my comments to a criticism that we constantly hear concerning the consistency provisions. And I expect to hear it again in response to this bill. I'm talking about the supposed "veto" power of a State over any and all activities conducted offshore.

In the area of activities performed by a federal agency, the determination of whether an activity directly affects the coastal zone is made by the federal agency. If a State disagrees with the federal agency determination, the State may request voluntary mediation. It is well known, however, that federal agencies rarely submit to mediation. Because the federal agency is not required to disapprove the activity following that State agency disagreement, the only recourse usually available for a State, if it disagrees with the agency's determination, is to go to federal court seeking an injunction.

If a federal agency does determine, however, that the activity will "directly affect" a State's coastal zone, a State reviews the findings provided by the federal agency. This is in contrast to a 307(c)(3) activity where a State reviews consistency based on its own findings in addition to the certification provided by the applicant.

If the agency does agree to voluntary mediation, or if the disagreement ends up in federal court, the burden of proof rests on the State, to show that the federal agency's consistency determination violates a federal law.

For federally licensed and permitted activities, the States possess initial review authority, but not the final word. Any adverse determination by the State to a permit applicant can be appealled to the Secretary. The Secretary is given clear guidance in the regulations on the grounds upon which he or she may reverse the State's determination. 15 C.F.R. 930.121. Finally, a ruling by the Secretary on a State's determination can be appealled to a federal district court for judicial review.

This short review of the consistency review process shows quite clearly that States do not have a "veto" power. They cannot unilaterally stop an activity from occuring. States do have the authority, however, to assure compliance with the federal CZMA.

Specific Discussion of S. 1412

I. "Significantly affecting"

The most notable change that S. 1412 would make to the CZMA would be to replace "directly affecting" with "significantly affecting" in section 307(c)(1). Such a change would render the Interior case inapplicable, at least to the extent that this decision pertains to "directly affecting."

"Significantly affecting" has had a great deal of judicial interpretation in a series of National Environmental Policy Act (NEPA) cases. Further, regulations promulgated by the Council on Environmental Quality (CEQ) add additional clarification to the meaning of the term, by requiring that both the "context" and "intensity" of a federal action be considered when determining whether an action has significant effects. Short and long-term effects, including cumulative ones, are to be assessed. 40 C.F.R. 1508.

Because of the substantial judicial interpretation of this term, coupled with existing regulations, we believe that it would be possible to implement consistency regulations that would give clarity to the term and provide the federal agencies the requisite predictability when making their determinations as to whether a federal activity would have "significant effects" on the coastal zone.

We must endorse the use of "signifiantly affecting" with some caution, however. Although using this NEPA term would have the double benefit of rendering the Interior case inapplicable while at the same time adding clarity and predictability to section 307(c)(1), we note that the focus of the term in NEPA is the effects on the human environment, and not on the natural resources, land and water uses in the coastal zone.

We believe it must be made certain by the Committee that a finding of no significant impact (FONSI) on the human environment, or similarly a negative declaration, under a NEPA review does not automatically trigger a finding of no significant effects on coastal zone resources or uses under a 307(c)(1) review. That is, because a federal agency determines that its action would be a FONSI under NEPA does not automatically exempt it from undergoing consistency review with a State.

It should also be made clear in S. 1412 or the legislative history that oil and gas lease sales would be within the scope of those activities that could "significantly affect" the coastal zone. Because this term is not defined in the CZMA it is important that the congressional intent that lease sales are meant to be within the scope of 307(c)(1) be clear and unquestionable.

II. "Fully consistent"

By amending 307(c)(1) to use the term "fully consistent" instead of "maximum extent practicable" Congress would actually be conforming the Act to NOAA regulations. NOAA defines the term "maximum extent practicable" as meaning that federal activities must be conducted in a manner "fully consistent" with a federallyapproved coastal management plan, 15 C.F.R. 930.32(a), unless certain circumstances exist or arise.

We believe that this is the best approach to take. Confusion will be limited, and any deviation from full consistency would be allowed only in clearly provided exceptions.

We must also note, though, that changing 307(c)(1) to require full consistency unless certain exceptions apply does raise the question of whether 307(c)(2) should be likewise amended.

III. Exemption of fishery management plans

CSO opposes a special consistency exemption for activities undertaken pursuant to the Magnuson Fishery Conservation and Management Act. This exemption was in proposed legislation three years ago, and the reasons we gave then remain valid.

We continue to question the advisability of listing a single federal activity as an exception per se to the consistency provisions. The primary purpose, we believe, of S. 1412 is to reestablish that all federal activities that significantly affect the coastal zone be fully consistent with approved State coastal management plans. This laudable purpose should not be obscured by the very limited and few compatability problems that have arisen between the MFCMA and the CZMA.

The problems that have arisen concerning Fishery Management Plans (FMPs) and the CZMA consistency process are restricted primarily to one State, and most of those problems have been resolved. But these disputes are a small fraction of the number of FMPs that have received consistency certification from the States. In reviewing this concern over the last several years, CSO has found no evidence to indicate that State consistency review has, in any way, obstructed the development of fishery management plans or harmed the nation's valuable fishery resources.

Further, the Administrator of NOAA published an Administrator's Letter in 1982, wherein he stated that the MFCMA and the CZMA "are fundamentally compatible and should be administered in a manner to give maximum effect to both laws." The fact that both laws are administered by NOAA may explain to some extent why the problems of co-implementation have been so few.

CSO strongly urges the Committee not to include this specific exception to the consistency requirements.

Conclusion

CSO strongly urges this Committee to restore the federal-State partnership that has been so severely weakened by the Supreme Court's decision in Interior v. California. CSO would very much like to see the original congressional intent reestablished, while renewing the federal government's commitment to coastal States in the administration of the national coastal management program, and encouraging State participation and cooperation in federal decisions affecting their coastal zones.

Coastal States seek no new authority, but rather a true partnership with the federal government as Congress intended under the CZMA. CSO believes S. 1412 will correct what the Court has so seriously misinterpreted. We support the purpose and goals of S. 1412. We look forward to working with this Committee and the full Congress towards passage of this important legislation.

This concludes my statement, Mr. Chairman. I would be pleased to answer any questions the Committee may have. Thank you.

Senator KERRY. Thank you very much, Mr. Delaney. I appreciate your testimony.

Let me just ask you one quick question. You heard Mr. Bettenburg with respect to the consultation process on the 5-year plan.

Mr. DELANEY. Yes.

Senator KERRY. Do you have a recollection as to whether or not you were consulted with?

Mr. DELANEY. The way we were informed of the 5-year plan is their announcement of it in the Federal Register, and then a distribution of it on a mailing list to all the states.

So we were contacted, as a whole array of other people would be contacted. But there was no call from Mr. Bettenberg to myself, saying we are about to develop a 5-year plan and we would like your direct consultation.

Senator KERRY. So they developed it, and just put it out.

Mr. DELANEY. And we reacted and commented, yes.

Senator KERRY. After the fact.

Mr. DELANEY. Yes.

Senator KERRY. Do you know what they did with the information you sent them regarding it?

Mr. DELANEY. Well, the information that went from the governor's office, as well as my Coastal Zone Management Office, which is identical—we have coordinated very, very closely on this matter—was included in several recommendations, which were not incorporated in this 5-year plan.

Senator **Kerry**. Now, coming into the arguments that have been made here against this, that it is, you know, going to provide States with a veto. What is your response to that?

Mr. **Delaney**. Well, there are several points that need to be thought of in this regard.

In the 307(c)(1) activities, which are mostly federally conducted and sponsored activities, the Federal agency makes the determination. They are obligated to look at our policies, make the determination as to whether their proposed activity is consistent with the State CZM plan, and submit that letter of determination to us. This gives us an opportunity to carry out some discussions with them.

But in the final analysis, if they determine that it is consistent, and persist in moving forward, that is an option they have. If the State feels the Federal Government has erred in their determination, it then becomes an obligation on the State's behalf to go into Federal court to litigate or to stop the activity.

The track record shows that that happens very, very infrequently. As I say, there is a 97-percent success rate. It means that if we are going to review any activity, we have to do it on the basis of looking at our federally approved coastal zone management plan.

So we cannot bring policies out of the blue, or out of left field, to review consistency. We use a document that has been developed by the state with tremendous consultation with the Federal agencies, approved by the Federal agencies beforehand, and ultimately put in place. So there are several safeguards in that process.

Senator **Kerry**. Why does section 19 not work adequately?

Mr. **Delaney**. Well, section 19 is more of an advisory opportunity for the governors of the affected states.

In our case, when the last lease sale was announced by the Department of the Interior, they sent the appropriate letter to the Governor asking for his comments on it under section 19.

He responded, as you know, requesting certain tracts be deleted. The Secretary of Interior takes that into consideration, is supposed to do some balancing, and makes a decision.

What we have found repeatedly is that our section 19 comments have been, for the most part, ignored by the last several secretaries.

Senator **Kerry**. So the key to you is to have the ability to mediate or litigate. Is that correct?

Mr. **Delaney**. Yes. To be able to conduct that same dialogue within the Federal consistency forum, as opposed to just an advisory forum of section 19, makes it just that much more leveraged and more formal a process.

And we think that we could be more effective in that regard.

Senator **Kerry**. Do you think that the current bill would result in an expansion of state consistency authority over what you had before the 1984 Supreme Court decision?

Mr. **Delaney**. Senator, I believe that the bill essentially restores to the original level the authority for the states to provide consistency.

We have basically operated under a perspective that the only activities, the activities we are most concerned about, are the ones that have a significant effect on our coastline anyway.

It is just that we do not have the capacity to look at a lot of lower threshold types of activities. So this language in the bill, I think, just essentially restores that threshold level.

Senator **Kerry**. Mr. Douglas, would you respond to Mr. Ghylin's statement that CZMA has been allowed to delay or prevent the orderly deployment of offshore resources?

Mr. **Douglas**. Yes, Senator. I appreciate the opportunity to be here and respond.

First of all I am not really flattered that California is so often cited as an example for how consistency has not worked. I am also dismayed, frankly, at the looseness with which the facts have been treated.

I think if the record were properly presented, you would find the situation to be quite different than how you heard it today. And I intend to respond to a number of those points in writing later.

As to our lease sale experience, prior to the 1984 decision by the Supreme Court, the Coastal Commission reviewed five lease sales offshore California. Those sales included 563 tracts.

The Commission objected to 190 of those 563 tracts being included in the final lease sales. Indeed, leases were later issued for 161 of the 563 tracts. And of the 161 tracts actually leased, only 27 had been objected to by the Commission.

Subsequently, the Coastal Commission received plans of exploration on two of the 27 tracts that it had objected to. So you can see that the numbers already differ from what was said earlier.

And of the two tracts the Commission had objected to being leased, one was objected to by the Coastal Commission at the plan of exploration stage. That objection was subsequently reversed by the Secretary of Commerce on appeal.

A plan of exploration was approved or concurred in by the Commission for the other tract. So the record does not show that exploration has been stopped by the California Coastal Commission.

Now as to the Exxon situation that Mr. Ghylin mentioned. The first Exxon reviewed project by the Coastal Commission was not under Federal consistency, rather it was a permit action. That action was prior to the Commission's authority to review applying Federal consistency and was a permitting situation where the onshore facilities were conditioned in a manner that Exxon simply did not like and said they could not accept. So Exxon proceeded to develop their unit offshore, using a so-called OS&T, an offshore storage and treatment facility. They did that so that they did not have to pipe the oil onshore.

We are now in a situation with Exxon where two options were presented for further development of the field. One of the options included expansion of this offshore treatment and storage facility. The Commission objected to this option, but concurred and approved the onshore processing option. I think that the current situation with Exxon shows you a good example of how indeed the process works well.

It is my understanding that this project is now proceeding in a manner that will allow the development of the St. Ynez field in an environmentally sound manner. It will result in some of the major objectives that we have been pushing for—as I think other coastal states have—the consolidation of facilities onshore, and the transport, ultimately, of oil by pipeline.

So I think the latter experience under Federal consistency, shows how the process is working.

Senator Kerry. Can you comment on your letter that you sent to DOI regarding future sales?

Mr. **Douglas**. Yes, the letter refers to the 5-year lease sale program. I think here too, a misimpression was left with the Members of the Committee and the audience.

The Coastal Commission did not object to all leasing in the future offshore California. What the Commission objected to was new areas being leased—new lease sale areas called for in the 5-year program.

There are enough existing lease areas under previously approved lease sales to allow significant expansion and development—and I think Senator Wilson accurately characterized that—through the year 2000.

The Commission, acting on a "review and comment" and not on a formal consistency review basis, was frustrated by the lack of responsiveness of the Department of Interior to the concerns it had previously raised.

I think the Coastal Commission acted out of frustration, while recognizing that there are sufficient pre-existing leases out there to allow orderly development. I think the action was as much a message as it was an expression of frustration.

Senator **Kerry**. Mr. Snyder, in South Carolina, you do not have oil and gas pressures. We heard an earlier reference by Mr. Delaney about some of the difficulties that exist in other areas. I wonder if you would shed some light with us on how the situation is developing there?

Mr. **Snyder**. Thank you, Mr. Chairman. First of all, let me say that I am glad to be here today and be able to discuss this very important piece of legislation with you.

Our situation is somewhat different in South Carolina. We have not at this time had any major oil finds off our coast. However, there have been some exploratory work done in the past.

Today we join our sister coastal states in supporting this legislation, realizing that as technologies increase and as methods to find oil change we may be faced with impacts down the road.

In South Carolina, tourism is one of our major industries. We have many miles of beautiful beaches and marsh land. We would certainly like to be able to review any activities which would possibly impact those beaches and marshland in the future.

There are also activities other than offshore leasing that could come to bear under this legislation. For example, we have dealt with Federal projects like the Savannah River Plant SRP, a major Federal institution in South Carolina. We have reviewed activities and worked with SRP for several years through Federal consistency, although SRP is not in the coastal zone, but is some 75 miles inland.

I would like to say that South Carolina has had a very good relationship with our Federal agencies. I do not have any horror stories to tell you at all. And we anticipate keeping a very good working relationship with these agencies.

What we do want is upfront coordination on Federal activities, rather than having to react after an action has taken place. We would like to be able to sit down with Federal agencies early on in the process, whether it is concerning the oil leasing program or other activities, and work out any potential problems.

We do not see this as a situation where we would have local concerns overriding the national interest. We feel the local interest should be there, and should be included in the decisionmaking process. But ultimately, the Federal Government would have the responsibility.

We are not seeking the veto. In fact, our interpretation of the law would indicate that it has not given us the veto. But we would like to be able to sit down, up front, and work out our problems as a partnership.

Senator **Kerry**. Well, I appreciate those comments, and also your situation down there.

Let me just say that we are running significantly behind. I have already had to cancel one meeting that I had. But the next one I do not have any right to cancel, because it is the Democratic caucus, and I have got to be there.

So I want to get to the next panel, if we can. I may submit written questions that we might have to follow up on this.

And also, if you would like to address specific things you have heard here, and make them part of the record in order to try to clarify the facts, I think it is terribly important that we build that record and have the facts accurately at our disposal.

So I would welcome your submission and any clarifications which you would like to follow up with at subsequent times. I am very appreciative of you taking the time to be here with us. We thank you.

Mr. **Delaney**. Thank you, Mr. Chairman.

Senator **Kerry**. Thank you very much. If I could ask our final panel to come together here. Sarah Chasis and Robert Knecht.

Greetings, and thank you for your patience. I am sure you are aware of this, but I will say it anyway. The order of the panels is not a reflection on any importance here. Somebody has got to go first, and somebody has got to be last.

We appreciate you hanging in there. Let me ask both of you, if you can, to summarize. And then we will submit your full testimony in the record. Do you want to begin, Ms. Chasis?

STATEMENTS OF SARAH CHASIS, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL AND ROBERT W. KNECHT, UNIVERSITY OF CALIFORNIA, SANTA BARBARA

Ms. **Chasis**. Senator Kerry, with your permission, I would like to ask Bob Knecht to go first.

Senator **Kerry**. Terrific. Bob, you go ahead. You are on.

Mr. **Knecht**. Thank you very much, Mr. Chairman. We greatly appreciate your patience in conducting this long hearing this morning.

I think this hearing is exceedingly important to the future of coastal management in this country. Federal consistency, Mr. Chairman, is the lifeblood of the coastal zone management process.

And we have to protect it, if we care about the logic of that process.

We can have a coastal management program in this country without an effective Federal consistency provision. But it would not be a rational process, in my judgment, because so many actions occur outside of the coastal zone that affect the coastal zone.

That power to review Federal actions and federally permitted actions outside of the coastal zone has to be a part of the process, or the process becomes meaningless. It seems to me that it would be the beginning of the end of the coastal management program, in my judgment.

What I would like to do, Mr. Chairman, briefly, is talk from the perspective of the person that led the CZM program during its first 8 years of existence.

It was during that time that we wrote the original rules, that covered Federal consistency, and addressed the question of the State-Federal partnership. At that time, we made the first interpretations of what Congress intended in that language.

In my testimony, I talk about the CZMA legislation as a kind of "constitution" for the coastal zone. In the year of the 200th anniversary of the Constitution, it seems appropriate to look at it that way.

The heart of that Constitution is a set of interlocking requirements—one on the Federal Government and one on the States.

The States were asked to incorporate adequate consideration of the national interest in the siting and facilities in their coastal management programs as a requirement of Federal approval.

This was taken as a very serious requirement by the States, and by our office in reviewing those programs. States spent a long time consulting with Federal agencies, considering what the national interests in their coastal zones really were, and how to include them.

Ultimately, the Federal agencies, working with our office in NOAA, looked at the State response, and those programs were approved after hard work by both the State and the Federal side.

That was one half of the bargain. The other half of the bargain was that Federal agencies then had to act consistent with those federally approved state programs.

Federal actions were not to frustrate those state coastal management programs. That was the two-part deal.

It was clearly understood at that time—in our regulations, by the states, and by the other Federal agencies—that actions that affected the coastal zone whether landward of the coastal zone, seaward of the coastal zone, within Federal enclaves in the coastal zone—all were to be consistent to the maximum extent practicable.

That was a clear understanding at the time. And it is that understanding that is now in danger of being set aside.

Senator **Kerry**. When you say it was clearly understood at the time, where is that so clearly set out?

Mr. **Knecht**. In the regulations that NOAA wrote at the time, and in the instructions and guidance that we provided to the States in our memoranda.

That was the clear interpretation of NOAA and the Commerce Department at the time. In fact we took the issue to the Justice Department to try to resolve the dispute between Commerce and

Interior regarding OCS leasing. We did not get a totally clear resolution at that time however.

The 1984 Supreme Court ruling, of course, threw out the application to lease sales. That narrow exclusion might be able to be lived with, but the problem is the current broadening of that interpretation to include so many other activities that certainly should not be excluded from the federal consistency requirements.

And that is the real threat. And it is clear that the administration is moving in that direction. The actions by the Justice Department, the Interior Department, and the Commerce Department all point to this.

It seems to me that your legislation is absolutely necessary to counter this threat and deserves early attention by this committee. Fortunately the House, as you know, is also considering legislation.

In terms of the gradations of differences between the Senate bill and the House bill, I think they both would accomplish what needs to be done.

And that is a clear statement of when and where Federal consistency applies—that is, that it applies landward and seaward and within the coastal zone, and it applies to all activities that directly affect the coastal zone and the resources of the coastal zone.

That clarification is needed, and in my judgment it simply restores what we had before. It does not create any new ground, it does not shift the critical balance between the states and the Federal Government. So I would urge your early passage of that legislation.

One other point. When Senator Stevens discussed this matter at a hearing in this room in April, he said that he felt that the application of Federal consistency by California was frustrating national objectives and the national energy goals.

Mr. Douglas spoke to that issue briefly. Douglas' office has put out a recent report that shows that California has been responsive to the national energy needs. And indeed, the Exxon case that he mentioned, the Santa Ynez unit, is a good example.

If I can have one more minute, Mr. Chairman, to elaborate this slightly. What has resulted, because of application of Federal consistency, and the strong environmental and coastal standards in California, is a model oil development project. That project is going to result in three new platforms, the largest development of new oil off California's coast in the last decade—Three platforms that are going to be clean platforms.

And they are going to be electrified platforms for the most part without diesel emissions, and 50 percent more oil is going to be produced than would have been the case had the original Exxon proposal been accepted.

So we have a better project, with more oil for the nation, a cleaner project, because the state hung tough, and because the Federal consistency provisions required discussion, and eventually a resolution of the project.

I think it is a good example of the way the process ought to work. Thank you.

Senator KERRY. I thank you. Thank you very much.

Ms. CHASIS. Mr. Chairman, my name is Sarah Chasis. I am with the Natural Resources Defense Council. And as you can see from our written testimony, there is strong support for this legislation from conservation groups around the country.

What I would like to focus on in my oral remarks are rebutting, addressing some of the arguments that opponents of the legislation have made. I think Mr. Knecht has well stated the affirmative case for the bill.

Senator **KERRY**. While you do that, would you be sure to address the question of their allegations about the term, significantly, and how that interpretation may or may not open up Pandora's Box?

Ms. **CHASIS**. Well, let me start with that. I think that it is crucial that legislation clarify what activities affect the coast and trigger consistency, because the Supreme Court left unclear what the current term, "directly affecting", means.

What we do know from that decision, however, is that activities such as lease sales, which do down the road have major implications for the coast, are exempt. So we do need to see a change in the term "directly affecting", because as it is currently written it does cut out major actions.

[The statement follows:]

STATEMENT OF SARAH CHASIS, NATURAL RESOURCES DEFENSE COUNCIL, INC.

I would like to thank this Committee for inviting me to testify today regarding S. 1412. As you can see from the groups joining this testimony, there is widespread support among conservation organizations for this legislation.

I. THE NEED FOR THIS LEGISLATION

A. Introduction

The legislation before this Committee today is of the utmost importance. This bill would overturn the 1984 decision of the United States Supreme Court (*Secretary of Interior* v. *California*) which dealt a serious blow to the Coastal Zone Management Act (CZMA) and the important protections this Act affords our nation's coastal resources.

The CZMA was passed in 1972, amended in 1974 and 1976, reauthorized and strengthened by Congress in 1980 and 1986 in explicit recognition that the coastal zone contains some of the nation's most ecologically valuable resources and that these resources are under tremendous development pressure. The Census Bureau estimates that by 1990, 75 percent of the nation's population will be living within 50 miles of the coast.

Since 1972 the CZMA has been the principal mechanism available to coastal states for managing the burgeoning pressures of development. The network of state coastal zone management programs, developed under CZMA and now in place in 29 coastal states and territories,[1] provides the only comprehensive national program for coastal protection.

In exchange for state development and implementation of these much needed programs, CZMA promised two things: Federal funding and the consistency of Federal activities with a state's program, once the state's program was federally approved and so long thereafter as it was implemented in conformance with Federal requirements. As you know, this Administration has consistently sought to eliminate the first incentive. Only strong support from members of this Committee and others in Congress has enabled Federal funding to continue. Unfortunately, the Supreme Court's decision in *Secretary of Interior* v. *California* has substantially undermined the other major incentive to a comprehensive national network of state coastal programs. The Court, in a 5 to 4 decision, held that the Department of the Interior's Federal offshore leasing decisions—in which millions of acres of offshore lands are put up for lease for oil and gas drilling each year—are exempt from the Federal consistency requirement, thus frustrating the states' ability to comprehensively plan for their coasts. The Court's holding with respect to oil and gas leasing is bad enough in and of itself; however, the Court's decision goes even further, arguably exempting from the consistency requirement *any* federally supported or conducted activity outside the state's coastal zone, no matter how major or significant its coastal impacts. Since the court's decision, Federal agencies have seized on the Court's language to argue that their activities should be similarly exempt from consistency review. As a consequence, we are increasingly seeing the original promise and value of the consistency provision eroded.

---

[1] Alabama, Alaska, American Samoa, California, Connecticut, Delaware, Florida, Guam, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, the Northern Marianas, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Virginia, the Virgin Islands, Washington, Wisconsin.

Failure to overturn the Supreme Court's ruling will violate the Federal commitment made to the states that Federal activities affecting the coastal zone will be conducted in a manner consistent with states' coastal management programs. Since coastal management programs are developed under the guidance of the Secretary of Commerce, reviewed by Federal agencies and subsequently approved by Federal officials, it is only reasonable that Federal agencies be required to abide by what they have agreed to.

B. The effect of the Supreme Court's decision

In *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), the Court held that no consistency determination under CZMA § 307(c)(1) is required for Federal oil and gas lease sales on the Outer Continental Shelf (OCS) for three reasons:

1. Congress when it enacted § 307(c)(1) in 1972 intended that it cover Federal activities within a state's coastal zone, or on Federal enclaves within a state's coastal zone (which are technically excluded from the Act's definition of coastal zone), *not* federally conducted or supported activities geographically located beyond a coastal state's territorial waters.
2. Federal oil and gas lease sales on the OCS are not federally conducted or supported activities, and thus are more properly subject to § 307(c)(3)(B) rather than § 307(c)(1); yet § 307(c)(3)(B) clearly does not require a consistency determination for lease sales.
3. Issuance of an oil and gas lease only entitles the lessee to conduct "preliminary activities" and no more; thus, a lease sale does not "directly affect" a state's coastal zone.

While the Court's holding was limited to offshore oil and gas lease sales, its impact is much broader. The Court's narrow construction of the geographic scope of § 307(c)(1) arguably precludes its application seaward of a state's coastal zone. The Court's reasoning also throws into question § 307(c)(1)'s applicability to federally conducted or supported activities landward of the coastal zone.[2] Finally, the opinion raises questions about § 307(c)(1)'s applicability to important federal decisions which set in motion a chain of events likely to directly affect the coastal zone, but which themselves have no immediate effects on the coast.

The Court in its decision overturned longstanding interpretations of the Act upon which the states relied in developing their programs.[3] It is the far reaching scope of the Court's decision which makes particularly urgent the need for Congressional action.

C. The importance of reversing the Court's decision

Unless the Court's decision is reversed, important federal decisions having major impacts on a state's coastal zone will be exempt from the consistency requirement. First and foremost are offshore oil and gas lease sales.

The Court's decision has the effect of subjecting private activities under a lease to consistency review (§ 307(c)(3)(B)), but exempting the basic federal decision to lease. Yet it is the Secretary of the Interior's decision at the lease sale stage that sets the basic scope and charter for later development. It is at the lease sale stage that the Interior Department selects the tracts to be offered and formulates the lease stipulations to be applicable to subsequent activity. If the states are denied a meaningful role at the lease sale stage when initial decisions are made and millions of dollars are invested, the state will be relegated to the defensive role of objecting to the exploration and development proposals of individual lessees as they are presented. Alternatively, it can lead, as it has off California and Massachusetts, to Congressionally imposed leasing moratoria. From both a policy and pragmatic point of view, it makes sense for the Interior Department to address a state's concerns at the lease sale stage and seek to resolve any conflict early in the process, rather than waiting until a significant investment of resources has been made.

---

[2] Since the Court focused on the Act's coverage of federal activities *seaward* of the coastal zone, it could still be argued that landward activities are covered; however, the outcome of any litigation on this point is far from certain.

[3] Several longstanding interpretations of the Act by NOAA, as expressed in regulations first issued in 1977, are directly at odds with the Court's decision. For example, 15 C.F.R. 930.33, which was in effect at the time of the Court's decision stated that: "Federal activities outside of the coastal zone (e.g., on excluded Federal lands, on the Outer Continental Shelf, or landward of the coastal zone) are subject to Federal agency review to determine whether they directly affect the coastal zone."

Federal oil and gas leasing is not the only type of federal activity affected. Federal leasing of offshore lands for the extraction of ocean minerals, ocean dumping of contaminated dredged soils, designation of ocean sites for incineration of hazardous wastes, certain Army Corps of Engineers dredging activities and the sale or transfer of federal lands for development are examples of federal activities which, no matter what their effects on the coastal zone, are arguably exempt from federal consistency review because of the Supreme Court's decision. Indeed, since the Court's decision several federal agencies have cited the Court's decision in arguing that their activities are exempt from consistency.

The Administration originally testified that it would narrowly construe the Supreme Court decision. In 1984, Assistant Attorney General Carol Dinkins stated that it was the Administration's position that the Supreme Court decision *did not* affect other federal activities and was narrow in scope.[4] In line with this position, NOAA amended its regulations to exempt only OCS sales from § 307(c)(1). 15 C.F.R. 930.33(c) (1985).

Despite this, federal agencies including the Justice Department are now taking a contrary position. For example, the Army Corps of Engineers has proposed regulations governing dredging activities that restrict consistency review to projects within the coastal zone.

"Section 307 of the Coastal Zone Management Act (CZMA) requires that any activity that a Federal agency conducts or supports within a state's coastal zone or in a Federal enclave within the geographical area of a state's coastal zone be consistent with the Federally approved state management program to the maximum extent practicable." 51 Fed. Reg. 19694, May 30, 1986. This language restricting consistency to projects within the coastal zone is at direct variance with the language of CZMA (which refers to activities "directly affecting the coastal zone") and the longstanding NOAA interpretation of these terms to include federal activities, regardless of where they are located (i.e., within or outside the coastal zone), which have a direct effect on the coastal zone. See 15 C.F.R. Section 930.33(c). The proposed rule represents an effort to extend the Supreme Court ruling in *Secretary of the Interior* v. *California* beyond OCS lease sales and hence contravenes Justice's and NOAA's positions.

Second, in the context of litigation, the Justice Department has argued that federal activities landward of the coastal zone are exempt from consistency relying on *Secretary of the Interior* v. *California*. In a lawsuit filed by the State of North Carolina challenging the Army Corps' proposed diversion of water from Lake Gaston (*State of North Carolina* v. *Colonel Ronald E. Hudson, et al.*), the Justice Department argued that since the Lake was outside North Carolina's coastal zone the project was not subject to consistency, citing *Secretary of the Interior* v. *California*. In another case, *State of California* v. *Lehman*, the Justice Department argued that the Navy's condemnation of land was not subject to the consistency requirement because the land was located landward of the coastal zone. These positions directly contravene the Justice Department's prior testimony.

Third, the General Services Administration has used the Supreme Court's decision to argue that disposal of federal surplus property is not subject to consistency.

II. COMMENTS ON S. 1412

A. Basic support

We strongly support S. 1412. S. 1412 would help to reestablish the status quo that existed prior to the Supreme Court's decision. The bill provides that § 307(c)(1) covers federally conducted or supported activities "significantly affecting" the natural resources or land and water uses in the coastal zone. We favor this change. It ensures that the consistency requirement is applied to federal activities which have significant impacts on a state's coastal resources or land or water uses, and thus eliminates from review activities which have only negligible effects. Second, it ensures that federal activities setting in motion a change of events having significant impacts on the coastal zone, such as offshore oil and gas lease sales, are subject to consistency review. Because of the Supreme Court's very narrow interpretation of "directly affecting," such clarification is necessary. Finally, the term "significantly affecting" has been interpreted by the Council on Environmental Quality and by case law under NEPA for the last seventeen years, thus providing useful guidance on what the term means.

---

[4] Hearings before the Subcommittee on Oceanography and Merchant Marine and Fisheries Committee, 98th Congress, 2d Sess. No. 98-52 (1984).

S. 1412 also clarifies that full consistency is required except in specified circumstances. We support all but one of these exceptions—the FCMA exception. The argument is made by some that fisheries management plans adopted pursuant to the FCMA should be exempt from consistency review because states already play a key decision-making role in the adoption of fishery plans and because the additional consistency requirement would theaten regional fisheries management.

It is true that unlike other federal activities subject to § 307(c)(1), the FCMA gives the states a major role in decision-making. As opposed to an activity such as OCS leasing over which states have little power, the key decision-makers under the Magnuson Act are the Regional Fishery Management Councils. Membership on these councils is made up primarily of people recommended by the Governors of the states in the region. The Secretary of Commerce's authority to review the decisions of these Councils is limited, particularly after the 1983 Amendments to the Magnuson Act. (The Secretary may disapprove a management plan if it would violate the Act; however, if it falls within the discretionary range, then the Secretary may not second-guess the Council.) However, we do not believe a generic, broad exemption is justified for three main reasons: (1) the problems that have arisen when the FCMA with respect to consistency are primarily restricted to one state; (2) we believe the two acts can be administered compatibly; and (3) a general exemption would set a bad precedent of exempting federal agencies from consistency requirements.

The fact is that there has been little problem between the consistency requirement and fishery management. To the extent that there have been any real conflicts, they involved only one state—Florida—and those conflicts have now been settled. Moreover, NOAA Administrator's Letter No. 37 ("Interrelationship of the Magnuson Act and the Coastal Zone Management Act") (Nov. 24, 1982) spells out the manner in which the FCMA and FCZMA can be implemented in a compatible manner. This letter makes clear that while consistency should apply to fishery management plans (FMP's), states may not force adoption of FMP's which are inconsistent with the national standards or other provisions of the FCMA (p. 7). Moreover, if an FMP is either more or as protective of the fishery resource as the state's CZMP, the FMP need not be altered, nor need it be altered if conditions offshore are demonstrably different from those nearshore.

The principal thrust of the legislation before you today is to reestablish Congress' intent that all federal activities be consistent with state coastal zone management plans. This goal should not be obscured by potential difficulties of coordination between fisheries management plans and state coastal zone management plans, particularly since the problems have been of very limited scope and can be compatibly resolved without the need for legislative exemption.

B. Recommendations

In addition to deleting the FCMA exemption, we recommend that the legislation clarify the following points. First, it should make clear that federally conducted or supported activities that significantly affect the coastal zone, whether within or outside the coastal zone, are subject to consistency review. Second, it should make clear that the transfer, sale or lease of federal lands is a federally supported or conducted activity and, hence, is subject to § 307(c)(1). These clarifications are needed to counter the Court's findings that: (1) federal activities seaward (and perhaps) landward of the coastal zone are not subject to § 307(c)(1) no matter what their impacts on the coast; and (2) federal lease sales are not subject to § 307(c)(1) at all.

III. ISSUES IN CONTROVERSY

There are important issues which opponents of this legislation raise. They include the following: whether the legislation would give the states a "veto" over federal actions; and whether existing law already gives the states sufficient influence over federal leasing decisions. We would like to address them.

A. State veto

The argument has been made that the proposed language would give states a veto over offshore oil development. This argument is without merit.

First of all, it is the federal agency, not the state, that decides whether the proposed activity is or is not consistent with the state's coastal program. Under NOAA's existing procedures, if a state does not concur in the federal agency's consistency determination and mediation cannot resolve the differences, the state must take the federal agency to court. Unless a court overturns a federal agency's decision, the federal action may proceed. The standard of judicial review is governed by the Administrative Procedure Act.

Second, the state coastal zone management programs with which federal agencies are required to be consistent are federally approved programs, which must meet the standards set out in Sections 305 and 306 of the Act before the consistency requirement becomes applicable. Thereafter, application of § 307(c)(1) is conditioned on state implementation of the federally approved program. Section 312 of the CZMA requires continuing review by NOAA of state implementation. NOAA is required to withdraw approval of any program if the state is failing to adhere to and is deviating without justification from the approved management program. § 312(d). If federal approval is withdrawn, the consistency requirement no longer applies.

Finally, federal agencies play an important role in the initial development of a state's coastal zone management program. Under the CZMA, NOAA may not approve a state's program "unless the views of Federal agencies principally affected by such programs have been adequately considered." § 307(b). Another prerequisite for approval is a finding that the state's program "provides for adequate consideration of the national interest." § 306(c)(8).

Thus, the structure of the CZMA assures that arbitrary actions by states to "veto" federal actions cannot occur. Indeed, the record to date demonstrates that this has not occurred.

In testimony before this Committee on March 28, 1984, the Commerce Department estimated that in 1982 (prior to the Supreme Court's decision) states reviewed approximately 300 Federal activities under Section 307(c)(1) with nonconcurrence in only about 3 percent of the cases. States objected to only 2 percent of the 7,500 consistency determinations done under Section 307(c)(3)(A), and they objected to only 0.5 percent of the 500 consistency reviews under Section 307(c)(3)(B).

More recently, in testimony before the House Merchant Marine and Fisheries Committee Subcommittee on Oceanography on June 10, 1987, Ralph Tarr, Solicitor of the Department of the Interior Department, reported that from 1973 to May 1987 state agencies had reviewed 2,200 OCS exploration and production plans and refused to concur in the lessees consistency certification in less than one percent of the cases. This record amply demonstrates that states have exercised their consistency authority responsibly and that consistency will not stop OCS development in its tracks or otherwise damage the national interest.

B. The OCS Lands Act amendments

Opponents of this legislation argue that there is no need for state consistency review at the lease sale stage because the Outer Continental Shelf Lands Act Amendments (OCSLAA) of 1978 gave states a significant role in lease sale decisions. Under Section 19 of OCSLA the Secretary of the Interior is supposed to accept the recommendations made by the Governor of an affected coastal state regarding the timing and location of leasing, if he determines that the Governor's recommendations represent a reasonable balance between the interests of the state and those of the nation. Unfortunately, as interpreted by the Secretary, this section has given states little or no say over leasing decisions off their coasts. The Secretary has repeatedly rejected recommendations made by coastal Governors.

For example, in the five year period from 1981–1986, in lease sale after lease sale,[5] the Secretary rejected the Section 19 recommendations of the Governors of nine states—California, Massachusetts, New Jersey, New York, Virginia, Maryland, Louisiana, Texas and Alaska. The states felt so strongly that eleven lawsuits were filed challenging the various sales.[6] (Massachusetts and California each sued over two sales.) In 1985 and 1986, because of dissatisfaction with the current law, Congress came close to amending and strengthening Section 19. Unfortunately, at the last minute, the conference report containing this amendment was not passed.

CONCLUSION

We urge you to act favorably on this important legislation. Thank you for inviting our testimony.

---

[5] Lease sales 53, 68, Reoffering Sale 2, 52, 76, 81, 84, 82 and 92.

[6] These lawsuits met with varying success: three were successful; four were unsuccessful; three did not reach decision; one is still pending.

SUPPLEMENTAL STATEMENT OF SARAH CHASIS, NATURAL RESOURCES DEFENSE COUNCIL, INC.

I would like to rebut some of the arguments made by opponents of this legislation. First, this is not a bill which states can or will use to block OCS leasing. The record shows that states have used their consistency authority responsibly to date. In 1982, NOAA did a study which showed that, prior to the Supreme Court's decision exempting lease sales, states failed to concur in federal consistency determinations under section 307(c)(1) only approximately 3% of the time. In testimony this past spring before the House Merchant Marine and Fisheries Committee, Deputy Assistant Attorney General Hookano stated that between 1973 and 1987 states had failed to concur in less than 1% of the consistency determinations made pursuant to section 307(c)(3)(B) regarding OCS exploration and development/production plans. Moreover, there are safeguards built in the CZMA which prevent states from using their consistency authority arbitrarily. It is the federal agency which makes the consistency determination. The state is given the opportunity to concur or not. If the federal agency proceeds in the face of state opposition, it is the state which must take the federal agency to court and show that the agency has been arbitrary and capricious, not an easy standard to meet. Furthermore, federal agency action is measured against a federally approved program, which is receiving federal money and is subject to continuing review by the Office of Ocean and Coastal Resource Management (OCRM) pursuant to section 312 of the Act.

Second, the question has been raised whether use of the term "significantly affecting" in the bill will open up a Pandora's box and lead to extensive litigation. The fact is there is confusion now regarding the term "directly affecting" in the current law—confusion about whether it applies to activities seaward or landward of the coastal zone and to major development decisions the impacts of which are not felt immediately but down the road. S. 1412 would clarify this confusion. It makes clear that consistency review issues apply to such activities. "Significantly affecting" also is a term which has been utilized under NEPA since 1970 and has been given definition under CEQ regulations and under case law developed under NEPA. Moreover, S. 1412 would narrow the range of impacts considered under consistency, as compared to what is covered under NEPA. This is because the Senate language specifically talks about federal activities significantly affecting "the natural resources or land or water uses in the coastal zone," rather than NEPA's broader language referring to impacts on "the human environment." The argument that use of the term "significantly affecting" will increase litigation is a red herring. There will be litigation on offshore oil and gas issues so long as state concerns are not meaningfully addressed by the Interior Department. Interior is the only federal agency that has generated much litigation under the consistency provision. The simple reason is that it has been adamant about rejecting state concerns. This legislation would force Interior to consult meaningfully with the states and consequently would effect a reduction in litigation.

Finally, S. 1412 is legislation that we cannot afford to see languish. We are seeing an increasing erosion of state consistency authority not only in the oil and gas area but with respect to other federal activities, including those landward and seaward on the coastal zone. This is not a time when we can afford to see consistency authority eroded. There is growing national concern about degradation of our coasts and coastal pollution. OTA just completed a report on "Wastes in the Marine Environments" which found that unless we adopt more stringent controls, pollution of our near coastal water will worsen. According to the Census Bureau, by 1990, 75 percent of the population will live within 50 miles of the coast putting even more pressure on coastal waters. Consistency authority provides states with a key mechanism to ensure that federal development activities do not contribute to further degradation of coastal waters nor damage to valuable resources. Without this legislation, the Supreme Court's decision and the interpretation of that decision now espoused by the Administration cast doubt over section 307(c)(1) coverage of many of these potentially polluting federal activities, including ocean dumping of dredged spoil, ocean incineration of hazardous wastes and the designation of sites for such incineration, Corps dredging activities, the sale or transfer of federal lands for development, upstream projects which can contribute to degradation of estuarine and coastal waters. This legislation would clarify the scope of consistency and insure that these major federal activities are subject to its requirements.

Thank you for the opportunity to present this supplemental testimony.

Senator **KERRY**. Do you oppose all lease sales?

Ms. **Chasis**. No. You can see from our organization's record, we have focused on Georges Bank, Bristol Bay, areas along the California coast. We are very focused in the areas that we are concerned about.

Senator **Kerry**. And again, more for the record than for other things, but what are the key distinctions between the problems of one tract, and where you are willing to say, no, go ahead here? What would you say are the key distinctions?

Ms. **Chasis**. Well, if you look at Georges Bank and Bristol Bay, which are areas which we have particularly focused on, you are talking about world-class fisheries, in both instances.

In Bristol Bay it is salmon and crab and other fisheries. On Georges Bank it is mainly groundfish. Those are resources which we consider of tremendous national significance.

We do not see the States acting there to protect merely state or parochial interests. And I think that goes to rebutting one of the arguments that is made, which is that this legislation would lead to the elevation of local and State interests over national interests.

In fact, what we have seen the States protect under coastal zone management are resources of national significance, which the Interior Department has not given sufficient attention to.

On the State veto question, I think that the record shows that States have not used consistency to block Federal activities and OCS development.

NOAA did a study in 1982, before the Supreme Court decision, which showed that in only about 3 percent of the cases, did States not concur with Federal agency determinations of consistency.

And then last spring the Solicitor of the Interior Department, Ralph Tarr, testified that with respect to exploration and development of production plans on the OCS, from the period of 1973 to 1987, the states had objected to less than 1 percent of the plans.

We do not have a record of obstruction. And as Mr. Delaney said, the State has to take the Federal agency to court and show that the Federal agency has been arbitrary and capricious, before the State can stop an activity.

Mr. Bruce tried——

Senator **Kerry**. Inevitably they wind up going to court though, or did.

Ms. **Chasis**. Right.

Senator **Kerry**. Correct?

Ms. **Chasis**. Right. But——

Senator **Kerry**. So what do you say to the arguments of industry, which I hear frequently, and about which I am concerned, because it is not just in this area but other areas, that we competitively fall behind?

We lose the edge, because we get so tied up in litigation and so tied up in the process that we do not make decisions, and then it becomes more profitable and more competitive to go elsewhere, or others beat us with the technology, and you know, it is part of the whole falling behind of the United States.

How do you respond to that?

Ms. **Chasis**. Well, I think litigation results principally when you have seen Federal agencies refuse to comply with consistency.

The instances Mr. Bruce referred to, that prior to the Supreme Court decision States were using consistency to block leasing, that was because the Interior Department was refusing to make consistency determinations.

That was not over the determinations they made. That was because they were absolutely obstructing it. We have not seen litigation, extensive litigation with respect to other Federal agencies.

It is when a Federal agency, such as the Interior Department, is absolutely intransigent in accommodating and being responsive to concerns other than the oil industry, that litigation results.

And in fact, I think that this legislation, which would give states more leverage over the Interior Department, would force the Interior Department to be more accommodating, and I think ultimately would reduce litigation.

Senator **Kerry**. If they were more accommodating in the example about Massachusetts, where 95 percent was allegedly given, you know, the extra 5 was not. That would mean 100 percent giving.

Ms. **Chasis**. Well, in that instance——

Senator **Kerry**. Which in effect means no drilling.

Ms. **Chasis**. No, because the State was not objecting to the entire lease sale. They asked, I think, in that instance that 200, 197 tracts be deleted from, I think, over 500. I do not have the statistics exactly.

Senator **Kerry**. It was somewhere in that vicinity, yes.

Ms. **Chasis**. So it was not an instance where the state was saying, no lease sale.

On the section 19 question, I think that the record is clear that that section has not proved an effective tool. Between 1981 and 1986, a 5-year period, nine coastal States had their recommendations under section 19 rejected, and felt so strongly about it that they went to court. This section came very close to being amended by Congress in 1986, because is was recognized it was not effective. And only at the last minute did the Conference Report containing the amendment not pass.

Senator **Kerry**. Mr. Knecht, the Justice Department also makes the argument about the uncertain aspects of the term "significantly," and that that could cause a problem as you apply significantly differently in different states.

One state may say this is insignificant, another may say it is significant. How do you address that?

Mr. **Knecht**. Well, it is a difficult one. But as we have heard earlier this morning, a fair amount of case law has been developed under NEPA concerning the definition of significantly affects, and significant effects.

My own preference in terms of the slight gradations here is to prefer the House version slightly, which redefines "directly affecting." And it is the term directly affecting that the Supreme Court dealt with.

If we redefine it to clearly include OCS lease sales and other activities, then it seems to me we have more clearly overturned that decision. So I have a slight preference for newly defining "directly affecting" to clearly include these things.

But I would prefer to stay relatively close to the original language, but clearly include OCS lease sales and other activities, regardless of their location.

Senator KERRY. Let me ask you this. As part of a process of perhaps trying to reach a meeting of the minds on this, or even a compromise, is there a way to guarantee the consistency process and the original goals of the act, while perhaps reducing the threat of litigation or the contentiousness in a way that does not lose rights here, but which might make those who oppose this feel that they are not opening themselves up to an endless process?

Is there some meeting place there?

Mr. KNECHT. Well, I think we all seek the same thing, Senator, and that is predictability. We seek a process that all parties can understand and know in advance.

I think the original language, had it not been interpreted differently by the court, was good language. It was broadly written, it was interpreted into regulations that I think were understood.

The problem was, that some quarters did not like those interpretations. But I think relatively broad language, supported by more specific regulations, would be the way I would suggest.

Ms. CHASIS. Mr. Chairman, just one thought. It seems to me that you are focusing on the concern with litigation.

But one of the things that has resulted from states being shut out of the process currently is this push each year for congressionally imposed moratoria. And we have had it off Massachusetts, we have had it off California.

And I think, if this legislation were to pass, that would obviate the need for Congress having to revisit that issue. And I think that this would result in a better process, as compared to——

Senator KERRY. I am not specifically worried. I am just trying to address concerns on all sides and see what your answers are and make sure that we are trying to test this as well as we can here.

I think on this note I am going to have to get over to the caucus. And what I am going to do is leave the record open for the submission of any written questions, and in addition, if there is subsequent testimony which anybody wishes to submit, I would certainly appreciate receiving it.

And I thank everybody for their patience, and for their contributions to this hearing. The hearing is adjourned.

[Whereupon, at 1:03 p.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

September 29, 1987

The Honorable Ernest Hollings
Chairman
Senate Subcommittee on National
Ocean Policy Study
425 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Chairman:

The State of Alaska appreciates this opportunity to submit comments on H.R.3202 and S.1412, two bills which would strengthen the requirement for Federal agencies to be consistent with Federally-approved state coastal management programs under Section 307(c)(1) of the Coastal Zone Management Act of 1972. As our comments reflect, we believe that both bills contain provisions which would measurably improve the Federal commitment to state coastal management programs.

We support the requirement in both bills for Federal agencies to be "fully consistent" with approved state management programs. The current requirement for agencies to be "consistent to the maximum extent practicable" is unclear and subject to differing interpretations. Both H.R.3202 and S.1412 overcome this uncertainty by requiring full consistency unless it is prevented by certain specified conditions. With the exception of one condition described in H.R.3202, we have no major objections to the conditions which would allow a Federal agency to be less than fully consistent with state programs. We are concerned, however, with the second clause in H.R.3202 which would allow less than full consistency if unforeseen circumstances present a substantial obstacle to achieving full consistency. The ambiguity of this provision would undermine the predictability and clarity that the amendments seek to achieve. We recognize that the substance of this clause is currently part of Federal regulation 15 CFR Part 930.32(b). However, it would be more difficult to change this language if it was in the statute rather than regulation if its imprecision led to abuses in the future. We belive that the best way to resolve current uncertainties regarding the meaning of consistency is to clearly enumerate those activities which are and are not covered by the term.

The most significant change proposed in H.R.3202 and S.1412 relates to the scope of Federally-supported activities subject to Section 307(c)(1) of the Coastal Zone Management Act. Currently, only those activities that "directly affect" a state's coastal zone are required to be consistent with an approved state management program. H.R.3202 retains this provision, and includes a description of what specific activities would be considered to "directly affect" the coastal zone. S.1412 would require an activity "significantly affecting the natural resources or land and water uses in the coastal zone" to be consistent with a state program.

The State of Alaska strongly endorses the two provisions contained in subsection (B) of H.R.3202 which clearly define what Federal activities would be considered to "directly affect" a state's coastal zone. Given the continuing disagreement over what is meant by "directly affect" or "significantly affect", we believe an explicit definition of these terms is warranted. In particular, the scope of activities included in H.R.3202 would resolve many of the concerns Alaska and other coastal states have had with Federal agency interpretation of the term "directly affecting". Federal agencies have frequently interpreted this term too narrowly and have arbitrarily excluded from consistency review many activities that may significantly affect coastal land and water resources and their associated uses.

The ability of coastal states to effectively use the consistency provisions of either H.R.3202 or S.1412 will depend upon a climate of cooperative relations between the states and the Federal agencies involved in coastal management. Although the State of Alaska has not experienced substantial problems in utilizing its consistency authorities to the extent allowed by the current interpretation of the Coastal Zone Management Act, it has experienced problems working with Federal agencies to establish a body of coastal policy that balances local and state interests with Federal concerns.

Specifically, since 1985, the State of Alaska has had problems in obtaining the Federal Office of Ocean and Coastal Resource Management's (OCRM) approval for the incorporation of important local coastal management program elements into the statewide program. The foundation of Alaska's coastal management program are the detailed management plans prepared by 34 local coastal communities and regions throughout Alaska. With few exceptions, all of Alaska's coastal cities, boroughs and rural "coastal resource service areas" (CRSA) have chosen to prepare management plans that inventory natural resources, identify resource use conflicts and public interests within their jurisdictions, and develop policies to manage coastal development. Several of these coastal districts cover areas larger than many coastal states. From two to eight years are invested in a public planning process before the plans are approved at the state level by the Alaska Coastal Policy Council and submitted to OCRM for approval.

Since 1980, 27 of the 34 district coastal management programs have been approved by the State of Alaska. Twenty-two of these programs were approved by OCRM within four weeks through a routine approval procedure. However, since 1985, OCRM has viewed five district program approvals to be "amendments" to the Alaska Coastal Management Program. This has greatly extended the time involved in obtaining Federal approval. For example, in the case of the North Slope Borough, Federal action has been pending for 29 months.

The State of Alaska testified on this subject before the House Oceanography Subcommittee on June 10 as part of the oversight hearings relating to Federal administration of the CZMA. At that time, it appeared to the state that progress was being made in our efforts to work with OCRM to obtain their approval for these important programs. However, since that time, OCRM has taken the extreme action of denying approval of each of these pending amendments. These denials have brought to an abrupt halt the possibility of the state and OCRM working through a cooperative administrative process to resolve the state-Federal disagreements over the content of Alaska's program amendments. The state has recently had the following specific problems with OCRM:

- OCRM has denied approval of the Aleutians East CRSA coastal management program, despite the fact that the state had followed OCRM's guidance and revised the plan as they had directed.

- OCRM has refused to comment on program changes proposed by the state to address Federal concerns with the North Slope Borough coastal management program.

- OCRM has denied approval of the Northwest Arctic and Bering Straits CRSA coastal management programs without completing a detailed analysis of the programs. OCRM has not provided the state with a comprehensive assessment of the issues that must be addressed to achieve Federal approval of these programs.

Enclosed are copies of recent correspondence from the state to OCRM outlining these problems in greater detail and a summary of the status of the four pending amendments.

In conclusion, the State of Alaska believes that combining some of the better features from H.R.3202 and S.1412 would produce a single bill which greatly improves the current coastal consistency process. The explicit description of Federal activities subject to the legislation as characterized in H.R.3202 is particularly important. The State of Alaska is also becoming increasingly concerned that some Federal agencies have abandoned the cooperative spirit embodied in the Coastal Zone Management Act. While not directly related to the proposed legislation, we wish to bring to the committee's attention OCRM's continued unwillingness to work toward a cooperative solution to the state-Federal differences regarding Alaska's coastal management program. Thank you for considering the State's views on these matters.

Sincerely,

John W. Katz for
Steve Cowper
Governor

Enclosure
Status of Federal Reviews of
Alaska's Program Amendments

Aleutians East Coastal Resource Service Area (CRSA): The state has worked with OCRM since December 1985 to secure approval of the Aleutians East CRSA program and has revised the program twice to address their concerns. In February 1987, Governor Steve Cowper was assured by Dr. Anthony Calio, then Administrator of the National Oceanic and Atmospheric Administration, that the program changes made by Alaska would address the remaining national interest issues. In June 1987, OCRM distributed a draft environmental assessment which concluded that the revised Aleutians East CRSA program was approvable. On September 2, 1987, OCRM reversed that decision and denied approval of the Aleutians East CRSA program. OCRM's denial action was not substantiated by the administrative record and was a radical departure from the guidance they had previously given the state on the program.

North Slope Borough: The North Slope Borough (NSB) program was denied approval by OCRM in August 1986. The state repeatedly asked OCRM to specifically identify the issues that must be addressed prior to Federal approval of the program. In June 1987, the state was encouraged to receive a letter from OCRM which outlined three steps that the state could take to resolve Federal concerns with the NSB program. In August 1987, the state submitted proposed program changes to OCRM and asked for guidance as to whether the Federal concerns would be sufficiently addressed by the changes. In its response, OCRM refused to comment on the changes and suggested that the state work directly with selected private interest groups to address their concerns. The state cannot proceed with the NSB program modifications unless OCRM will provide guidance that ensures that the changes will address the national interest questions and facilitate Federal approval of the program.

Northwest Arctic and Bering Straits CRSAs: In September 1987, OCRM denied approval of both the Northwest Arctic and Bering Straits CRSA programs, citing concerns with the extent of the inland boundaries and the designation of "important use areas" within these coastal districts. OCRM has been unresponsive to the state's suggestions of proposed program changes intended to address their concerns with the NANA CRSA program. OCRM has not completed a detailed review of the Bering Straits CRSA program which would comprehensively identify, for the state's information, the issues blocking Federal approval of that program.

STATEMENT OF DR. ARTHUR GAINES, JR., CHAIRMAN, COASTAL RESOURCES ADVISORY BOARD

I am very pleased to submit this written testimony and to participate in your examination of the proposed Hollings amendment to the Coastal Zone. My name is Arthur G. Gaines, Jr. I hold a doctorate in oceanography and am employed at the Marine Policy Center of the Woods Hole Oceanographic Institution. I am testifying today in the capacity of a private citizen, on behalf of the Coastal Resources Advisory Board, a citizen's advisory board to Massachusetts Executive Office of Environmental Affairs. This Board, of which I am Chairman, consists of 15 members representing various backgrounds: marine business, conservation, law, marine science and policy, citizen advocacy, shellfish management, land planning, land development, fisheries, etc. Our membership represents viewpoints, but not institutions. We are appointed by the Governor.

We urge the Congress of the United States to clarify and strengthen the legal footings of the "federal consistency" doctrine; to rearm our State coastal management programs with a needed tool; and to send a clear message to the Executive Branch that this nation must have effective planning and management at America's frontier with the sea.

In my short testimony I wish to develop three points:

1) Effective Coastal Zone Management is needed in America today.

2) The federal consistency doctrine is essential to effective coastal management.

3) Strengthening federal consistency review is only one step needed to strengthen coastal management in America.

I have no doubt this committee and the House of Representatives counterpart will hear testimony from legal scholars, scientists and professional managers. I will not try to address matters of legal precedence, specific wording within the proposed amendment, or specific coastal impacts of known or potential pollutants or activities. Rather, I am concerned about the overall effectiveness of coastal management--of which your deliberations focus on one essential part--as practiced at three levels of government in the U.S.

I. More than ever, Coastal Zone Management is needed today.

Despite the excellent record of CZM over the years, many of the problems giving rise to the Act in 1972 are even worse today. In the mid-1960s 20% of the nations shellfish beds were contaminated by pollution; today in Massachusetts a greater portion than ever of the shellfish harvest is lost to water pollution. Over the past five years, virtually every commercial fishery has declined in Massachusetts.

Coastal development in New England is occurring at unprecedented rates, and guidance of this development, which occurs to a large extent at the local level through zoning, is in turmoil. Town and regional planners and planning boards, as well as other local government officials, are exhausted and dispirited by the ceaseless onslaught of short-term interest developers, forcing high density, anachronistic condominiums and plat developments into neighborhoods that are stunned at the prospects. Officials responsible for providing municipal infrastructure, such as water, sewer service and police protection are bewildered at the task they face. Increasingly, these development corporations are staffed by personnel skilled at sophisticated approaches to beating local zoning codes and silencing outspoken objectors through legal intimidation stratagems. The local-based development companies of yesteryear increasingly take a back seat to national-scale and foreign-based developers of America's shores, whose interest in a project (and sometimes whose corporate personality) ends when the profits have been reaped.

As the population of the coastal band and use of coastal waters reaches new heights, addressing the intertwined problems of use-conflict becomes increasingly urgent: nutrient loading of the coast from areas far inland; sewage disposal in Boston Harbor from 43 surrounding cities and towns; threats to productive fishing grounds by dredged material disposal, supporting projects intended to improve the fishing industry; unprecedented algal blooms that decimate a regional bay scallop fishery on Long Island in one summer.

Coastal zone management is needed more than ever to insure a "freedom" than we perhaps have not valued enough in the past--the freedom from fear of the unpredictable. Despite many difficulties we face in this nation, orderly process and stability are generally characteristics of life we have come to enjoy and which we work toward. We need this order in coastal development as well: stability of our neighborhoods; the capacity to know what kind of coastal environment we leave to our children; confidence that the economies and amenities of the coast will be there for the next generation.

II. The federal consistency doctrine is essential to state CZM programs

Federal consistency review is the sole effective mechanism for state participation in coastal management decisions beyond the 3-mile limit, on federal lands in the coastal zone, and with regard to GSA surplus land sales. It is commonly stated that the federal consistency doctrine served primarily as an incentive for state participation in the CZM program, and there is no doubt it served that role. However, in practice, the federal consistency doctrine reaches beyond its intended purpose--it provides a process to ensure coherency at the state and local levels and it serves to streamline the permitting mechanism. It is probably accurate to say that in Massachusetts this is the primary use of federal consistency review.

In Massachusetts, federal consistency review links CZM with the larger environmental impact review process of MEPA, Massachusetts' analogue to NEPA. In this manner permit applications for coastal projects are screened for consistency with CZM policies as part of the Environmental Impact Report, and conflicts are almost always resolved by negotiation. In 1986 Massachusetts CZM reviewed 49 federal consistency certificates; 7 were objected to and, of these, 6 were settled by negotiation (the remaining application was patently illegal).

Federal, state and local environmental and enforcement agencies often have rather narrow mandates. Furthermore, it is not uncommon for different criteria to be applied by an agency or by different agencies to the funding of a project as opposed to permitting of the project. Federal consistency review provides a process by which coastal projects can be uniformly screened for compliance with Massachusetts coastal policies, and, in fact, development of a proposed project can be expedited by taking into account the policies to which it will be expected to adhere. I have already mentioned the significance of local zoning in coastal development. In Massachusetts, Town Conservation Commissions have statutory authority to administer the state Wetlands Protection Law. Using federal consistency, decisions made at this level can be brought into accordance with Massachusetts coastal policies at the stage where federal permits are issued. Thus federal consistency has not only caused States to prepare coastal policies (subject to approval at the federal level), it has become an incentive for local governments to do so as well.

In the more conventional sense, federal consistency is the only effective means by which states can have an assured role in GSA sales of surplus federal property. In Massachusetts 95 linear miles of shoreline are owned by the federal government, a large fraction of the publically owned coast. The disposition of this land is of great concern to residents of Massachusetts. When surplus lands on Nantucket Island were put up for sale, the first notice that reached Massachusetts state officials was an advertisement in a New York newspaper. The federal consistency doctrine provides a mechanism that can and must be reinforced to assure a substantive state role in the process by which surplus government lands are disposed of; and the involvement of state CZM assures public notice of such sales in a medium readily accessible to Massachusetts residents.

Federal consistency review has given the State effective bargaining power in federal environmental permitting. Here I refer, for example, to Sec. 404 dredge and fill permits issued by the Army Corps of Engineers under the Clean Water Act. In one instance consistency review limited the inappropriate use of nationwide permits. In another, the Army Corps of Engineers agreed to dispose of sandy dredge materials in an area where it would enhance a recreational beach, instead of at a deepwater site originally identified. The state also needs review on siting of deepwater ocean outfalls under the NPDES process--federal consistency review has allowed coordinated state agency and public participation in a decision with potentially crucial water quality impacts.

III. Reinstating effective federal consistency review is only one of several needed steps.

It is clear to us that effective coastal management needs participation at all three levels of government. Over the past few years we have seen dedicated, conscientious, competent efforts by participants at the state and local levels, but the national program has been very weak, despite support from Congress. It is essential to reestablish national leadership in CZM, by providing personnel that promote their programs and encourage and assist state programs. Review of state programs should be intended to improve them--not decertify them--for example, to encourage increased attention to national interests. The national CZM office could play a much increased role in improving coherency in coastal activities by federal agencies, and mediating differences between the state and federal levels.

Your deliberations and those of the House Subcommittee on Oceanography with regard to the Panetta-Lowry bill, are watched closely and with interest by those at the front lines of coastal management throughout America. We encourage you to move forward in favor of increased strength for federal consistency review and toward orderly, structured coastal management for America.

GALLOWAY & GREENBERG
ATTORNEYS AT LAW
1835 K STREET, N. W.
SUITE 801
WASHINGTON, D. C. 20006

L. THOMAS GALLOWAY
ELDON V. C. GREENBERG

TELEPHONE
(202) 833-8084

September 29, 1987

Honorable Ernest F. Hollings
Chairman
Senate Committee on Commerce,
  Science and Transportation
508 Dirksen Senate Office Building
Washington, D.C. 20510

S.1412

Dear Chairman Hollings:

I am writing on behalf of Southeastern Fisheries Association, Inc. ("SFA") concerning S.1412 (the "bill"), a bill under consideration by the Committee to amend the "federal consistency" provisions of the Coastal Zone Management Act of 1972 (the "CZMA"). SFA strongly supports the bill's exemption of fisheries management activities under the Magnuson Fishery Conservation and Management Act (the "MFCMA") from the application of "federal consistency" under of Section 307(c)(1) of the CZMA.

There are at least three compelling policy reasons to conclude that application of Section 307(c)(1) to fisheries management activities provides little positive benefit and has many serious drawbacks. First, the MFCMA creates a unique decisionmaking process, where Regional Fishery Management Councils comprised of State representatives, not Federal bureaucrats distant from the resource, are responsible for developing fishery management plans. Since the States are already so deeply involved in decisionmaking, consistency is unnecessary. Second, both the management regime and the resource to be managed are regional in nature. Indeed, because fish do not respect political boundaries, management of the resource throughout its range is a necessity, and no single State should be allowed, through consistency or other mechanisms, to dictate management results. Third, fisheries management has an international dimension i.e., allocation of resources to and the regulation of foreign fishing fleets, where foreign policy considerations come into play. It would be highly inappropriate to let a single State's parochial interests control such foreign policy matters.

SFA believes that the Committee made the right judgment in 1984 when, in reporting out consistency legislation, it excluded fisheries from the scope of Section 307(c)(1). It unequivocally concluded then that "application of the federal consistency requirements to the fishery management process is unnecessary and potentially disruptive." S. Rep. No. 98-512, 98th Cong., 2d Sess. 13 (1984). We see no reason for any different judgment today.

Thank you for your consideration of our views.

Sincerely,

Eldon V.C. Greenberg

Counsel to Southeastern Fisheries Association, Inc.

○